Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF PALM BEACH GARDENS, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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August 17, 1981

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QUESTION PRESENTED

The City of Palm Beach Gardens transferred the Palm Beach Gardens Community Hospital, a facility that had been built in part with grant funds provided under the Hill-Burton Act (42 U.S.C. § 291 *et seq.*), to a for-profit entity. This transfer, which occurred within twenty years from the completion of facility construction, was in violation of 42 U.S.C. § 291i. Over six years after the transfer of the facility, the United States brought an action under 42 U.S.C. § 291i to recoup the present value of the portion of the facility constructed with Hill-Burton funds.

The question thereby arising is:

1. Whether the statute of limitations contained in 28 U.S.C. § 2415 should be applied to actions brought pursuant to the Hill-Burton Act recoupment provision contained in 42 U.S.C. § 291i.

LIST OF PARTIES TO THE PROCEEDING

A. The City of Palm Beach Gardens

B. Palm Beach Gardens Community Hospital Corporation

C. Palm Beach Community Hospital, Inc.

D. American Medical International, Inc.*

E. Mrs. Bernard L. Samson, Frank Bonsey, William B. Wood, William H. Horner, Robert R. Nelson as trustees and distributees of United American Medical Services, Inc., a dissolved corporation.

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* Pursuant to Rule 28.1 of the Supreme Court Rules, the following information is provided:

there is no person or other entity which may be considered a parent of the Company. The Company generally conducts its operations through wholly owned subsidiaries, certain of which, primarily in foreign operations, have direct or indirect subsidiaries which are less than 100% owned by such subsidiaries. The only direct subsidiaries of the Company (except wholly owned subsidiaries) are Sofami S.A.R.L. and Clinique St. Antoine S.A.

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The *Petitioners,* CITY OF PALM BEACH GARDENS, *et al.,* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on January 26, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is reported at 635 F.2d 337. The opinion of the United States District Court for the Southern District of Florida (Appendix B) is reported at 466 F.Supp. 1155.

STATEMENT OF JURISDICTION

The judgment of the court of appeals, overturning the district court's decision, was entered on January 26, 1981. (Appendix C, pp. 1-2). Petitions for rehearing and rehearing en banc, timely filed, were denied on May 21, 1981. (Appendix C, pp. 3-4). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

The general statute of limitations for actions by the United States, 28 U.S.C. § 2415, provides in pertinent part, as follows:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact shall be barred unless the complaint is filed within six years after the right of action accrues. . . .
>
> (b) . . . an action to recover for diversion of money paid under a grant program . . . may be brought within six years after the right of action accrues. . . .

The Government's suit is based on the recoupment provision contained in 42 U.S.C. § 291i, which provides in pertinent part:

> If any facility with respect to which funds have been paid under section 291f of this title shall, at any time within twenty years after the completion of construction—
>
> (a) be sold or transferred to any person, agency, or organization (1) which is not qualified to file

an application under section 291e of this title, or (2) which is not approved as the transferee by the state agency designated pursuant to section 291d of this title, or its successor, or

(b) cease to be a public health center or a public or other non-profit hospital, outpatient facility, facility for long term care, or rehabilitation facility, unless the Surgeon General determines, in accordance with regulations, that there is good cause for releasing the applicant or other owner from this obligation,

the United States shall be entitled to recover from the transferor or the transferee (or, in the case of a facility which has ceased to be public or non-profit from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of the facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction or modernization under such project or projects. Such right of recovery shall not constitute a lien upon said facility prior to judgment.

STATEMENT OF THE CASE

A. Background.

On June 19, 1959, the City of Palm Beach Gardens ("City") was chartered as a municipality of the state of Florida. From its inception as a municipality until 1966, the City was controlled by the original developer, John D. McArthur. The developer-appointed city councils of this period were comprised mainly of employees of Bankers Life & Casualty Co., which was controlled by

John D. McArthur. During the period of developer control, the planning and construction of the hospital, which would eventually be known as Palm Beach Gardens Community Hospital ("Hospital"), were begun. Hospital financing was secured through a construction loan of approximately $800,000.00 from Bankers Life & Casualty Co., and through the $400,000 Hill-Burton grant in issue, which had been requested by the City during the developer-control period.

B. Early Existence of the Hospital.

Without financial support from the City, the Hospital sat idle in the middle of a cow pasture. As the district court opinion stated "the city stood burdened with an expensive and useless 'white elephant.' " 466 F.Supp. 1155, 1158 (Appendix B, p. 4). During this idle period, officials from the Florida Department of Health & Rehabilitative Services (the state Hill-Burton agency that was also an agent of the then Department of Health, Education & Welfare in Hill-Burton matters) as well as officials from the Facilities Planning and Development Section of the Office of Regional Health Planning (hereinafter referred to as the "HEW/Hill-Burton Regional Office") which was an entity of HEW, were urging City officials to open the Hospital or face an action for recoupment of the Hill-Burton funds used to construct the Hospital. There were meetings between officials of the state Hill-Burton agency, HEW/Hill-Burton officials, and City officials concerning the fate of the Hospital. At one meeting, after a threat of legal action by the Government for recoupment of the Hill-Burton funds, a City official attempted to give the keys to the Hospital to the Hill-Burton officials as an indication that the City would be glad to return the unwanted hospital to the Government.

C. Transfer of the Hospital From the City to For-Profit Entities.

Seeing no alternative, the City began negotiations with individuals for the sale of the Hospital. The City officials met with Arthur W. Forehand, the administrator of the Office of Community Medical Facilities, which is part of the Florida Department of Health & Rehabilitative Services (Florida's Hill-Burton agency), to determine the liability of the potential purchasers of the Hospital. Forehand, aware of the impending sale of the Hospital, warned of the possibility of an action by the United States for recoupment of the Hill-Burton funds under 42 U.S.C. § 291i.

Negotiations for the transfer of the Hospital resulted in a sale agreement which was executed on July 22, 1968. The sale agreement was modified once on September 30, 1968, and again on April 14, 1969. These modifications reflected a change in the purchaser of the Hospital. During this negotiation/modification period, Forehand, and thus the Florida Hill-Burton agency, received notice of the Hospital's sale through copies of newspaper articles which mentioned the sale of the Hospital. Aware of the Hospital's sale, Forehand, on October 9, 1968, wrote to city officials, warning them that the City was subject to an action for recoupment of the Hill-Burton funds used to construct the Hospital. On November 18, 1968, Forehand again warned City officials of the possibility of a Hill-Burton recoupment action arising from the sale of the Hospital. By November, 1968, Forehand had also notified the proper federal officials at the HEW/Hill-Burton regional office in Atlanta of the sale of the Hospital. On December 9, 1976, well over six

years after the proper government officials had requisite knowledge to maintain an action for recoupment of funds granted the City of Palm Beach Gardens under the Hill-Burton program, the Government brought this action for recoupment pursuant to 42 U.S.C. § 291i. In that the Government's action arose under 42 U.S.C. § 291i, federal jurisdiction was had pursuant to 28 U.S.C. § 1331.

ARGUMENT

I.

THE APPEALS COURT HAS DECIDED, INCORRECTLY, AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

A. The Question of Law to Be Settled by this Court is Whether the Statute of Limitations Contained in 28 U.S.C. § 2415 Should Be Applied to Actions Brought Pursuant to the Hill-Burton Act Recoupment Provision Contained in 42 U.S.C. § 291i.

Section 2415 provides that all actions by the Government based on an express or implied contract or that are brought to recover grant funds that have been improperly diverted must be brought within six years. The Hill-Burton recoupment provision states that if a facility is transferred to a non-eligible entity within twenty years from the completion of construction, the government may recoup a proportionate share of the present value of the facility as was initially constructed with Hill-Burton funds. The facts of the present action present the issue of the applicability of the statute of limitations contained in section 2415 to the Government's action for recoupment

under the Hill-Burton program. The appeals court reversed the district court and held that *no* statute of limitations applied to the Government's recoupment action under the Hill-Burton Act.

The appeals court decision creates an absurdity in the law. A Hill-Burton facility can be transferred with impunity beyond twenty years after completion of construction. Should, however, the same facility be transferred sometime within twenty years of the completion of construction, the Government can bring a cause of action to recoup the present value of the portion of the facility built with Hill-Burton funds at any time—ten, twenty, fifty or even one hundred years later. Congress clearly intended that the statute of limitations provided in 28 U.S.C. § 2415 should prevent such an absurdity.

B. The Court Should Decide the Question at Hand Because the Recoupment Language Contained in 42 U.S.C. § 291i is repeated in a Number of Statutes Dealing with Grant Programs.

This Court should decide whether the statute of limitations contained in 28 U.S.C. § 2415 should be applied to an action for recoupment under 42 U.S.C. § 291i because the resolution of this question will affect the applicability of the statute of limitations to recoupment actions under a variety of federal grant programs. The recoupment language contained in 42 U.S.C. § 291i is found in a variety of other grant programs; hence, the resolution of this question will be nearly conclusive precedent in actions for recoupment of federal funds brought under the other grant programs containing the same language. Accordingly, to allow the present decision of the appeals court to stand would create untenable precedent, not only

for recoupment actions under the Hill-Burton program, but also for recoupment actions under the other grant programs containing the same language.

The following statutes, involving a variety of grant programs, contain recoupment language that is the same or similar to that under examination in the present case:

1. 42 U.S.C. § 6006—provides for recoupment of funds expended under the Developmental Disabilities Services and Facilities Construction Act.
2. 42 U.S.C. § 2695—provides for recoupment of funds expended under the Mental Retardation Facilities and Community Health Centers Construction Act of 1963.
3. 42 U.S.C. § 274(e)—provides for recoupment of funds paid to Alaska for construction of hospital facilities.
4. 42 U.S.C. § 293c—provides for recoupment of funds expended under the Health Professionals Educational Assistance Act of 1963.
5. 42 U.S.C. § 295c—provides for recoupment of funds expended under grants for construction of mental retardation research facilities.
6. 42 U.S.C. § 295h(d)—provides for recoupment of funds expended under grants for construction of teaching facilities of allied health professions personnel [ten year recoupment period].
7. 42 U.S.C. § 300s-1a—provides for recoupment of funds expended under Title XVI of the Hill-Burton Act.

As this list illustrates, the recoupment language found in 42 U.S.C. § 291i has been employed in a variety of federal grant programs. Accordingly, the decision in this case will be a significant precedent in determining the

applicability of the statute of limitations contained in 28 U.S.C. § 2415, not only to recoupment actions under 42 U.S.C. § 291i, but under the statutes above cited, as well.[1] In that the decision in this case will have such significant precedential value, this Court should take this question of law under consideration.

C. This Court Should Decide This Question of Law Because the Appeals Court Decision not to Apply the Statute of Limitations Contained in 28 U.S.C. § 2415 to the Action for Recoupment Under 42 U.S.C. § 291i is Contrary to the Congressional Intent and Purpose of 28 U.S.C. § 2415.

The appeals court makes reference in its opinion to the general rule that statutes of limitation do not, unless Congress states otherwise, apply to actions by the Government. The objective supposedly furthered by such a rule is that of "protecting rights vested in the Government for the benefit of all from the inadvertence of the agents upon which the Government must necessarily rely." *United States v. City of Palm Beach Gardens, et al.*, 633 F.2d 337, 340 (5th Cir. 1981) (App. A, p. 6). This general rule and its objective are not applicable to the present case. Rather, it is the statute of limitations contained in 28 U.S.C. § 2415 and the objective furthered by such statute which are applicable to the present case.

The objective of the statute of limitations contained in 28 U.S.C. § 2415 is that of "improving existing procedure for the disposition of monetary claims by and

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1. See Magistrate's Findings and Recommendations currently under advisement with the District Court Judge in *United States v. Lutheran Medical Center—Richard A. Young Memorial Hosp.*, No. CV 79-0-531 (D. Neb., filed Oct. 19, 1979) (App. E, p. 8) regarding the precedential value of this decision.

against the government." H.R. REP. No. 1534, 89th CONG., 2nd SESS. 3, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2502, 2503 (hereinafter referenced only to the U.S. CODE CONG. & AD. NEWS). In the present case, the appeals court majority refers to the Government's action as one for the recovery of federal funds. *City of Palm Beach Gardens, supra,* at 339 (App. A, p. 4). Accordingly, the policy principles behind the objective of the statute of limitations contained in 28 U.S.C. § 2415 are applicable to the present action in that such principles apply to "monetary claims by . . . the Government," which the present action certainly is.

The first policy principle embodied in the general statute of limitations is that "private litigants would be assured of a more fair and balanced treatment when dealing with the Government." 1966 U.S. CODE CONG. & AD. NEWS 2502, 2503. Secondly, the limitations statute would encourage the prompt resolution of claims and thereby avoid the cost of record keeping necessary to assert or defend old claims. *Id.* The appeals court decision obviously frustrates these policy principles in actions for recoupment of federal funds under 42 U.S.C. § 291i.

A Hill-Burton facility that is transferred openly to a for-profit entity is, under the appeals court decision, certainly not on an equal footing with the Government in a subsequent recoupment action under 42 U.S.C. § 291i. The transferee and transferor of the facility are subject to an action by the Government for recoupment of Hill-Burton funds for an unlimited period of time after the transfer of the facility. This exposure exists *ad infinitum* even though the Hill-Burton facility need only remain nonprofit or public for twenty years after completion of Hill-Burton funded construction.

The appeals court decision also frustrates the policy principle of avoiding the costs of record maintenance necessary to prosecute or defend an action for recoupment under the Hill-Burton Act for an extended period of time. Because an action for recoupment under the appeals court ruling could be brought many years after the transfer of the facility, the Government and the Hill-Burton funded facility must maintain the extensive documentation necessary to litigate such a claim forever, or until the action is finally brought by the Government.

In a similar vein, the panel majority's decision places a financial burden on those entities that could be subject to a recoupment action by the Government in that the current decision would require such entities to escrow funds sufficient to reimburse the Government in the event a recoupment action was successfully prosecuted. Under the appeals court opinion, funds would have to be escrowed forever in that the Government's right to bring a recoupment action is perpetual. This requirement to escrow funds works an unfair burden on the entities potentially subject to recoupment actions by the Government; particularly, the public or non-profit transferor of the Hill-Burton funded facility.

The appeals court contends that the controlling policy principle in this matter is the protection of the Government's rights from the "inadvertence of the agents upon which the government must necessarily rely." *City of Palm Beach Gardens, supra,* at 339 (App. A, p. 6). Congress has clearly expressed a contrary policy principle in the adoption of the general statute of limitations. In the conclusion of the Senate report on the statute of limitations codified in 28 U.S.C. § 2415, the committee stated: "The Government will be barred from asserting

old and stale claims in the courts and the necessity for the early assertion of claims *will require increased efficiency in government claims proceedings.*" (Emphasis added.) 1966 U.S. CODE CONG. & AD. NEWS 2502, 2509. Congress, in asserting this policy principle, was not seeking to protect the government from the bumbling and negligence of its officers and agents. Rather, Congress, through the adoption of the six year statute of limitations for contractual matters (a time period longer than most limitation periods) intended that the agents of the Government assert claims in a timely fashion or have such claims lost. The negligence and bumbling of the Government's own agents in the present case are obvious. Congress, in adopting the statute of limitations codified at 28 U.S.C. § 2415, indicated its adherence to the general principle that the public interest is better served by encouraging, through a statute of limitations, the timely prosecution of claims by the Government. In sum, the appeals court, in analyzing the present transaction, has applied policy principles directly contrary to those principles Congress expressed in the general statute of limitations contained in 28 U.S.C. § 2415.

II.

THE APPEALS COURT, IN INTERPRETING THE HILL-BURTON ACT CONTRARY TO THE CLEAR LEGISLATIVE INTENT OF THE ACT, HAS VIOLATED THE LONGSTANDING RULE OF THIS COURT THAT AN ACT MUST BE INTERPRETED ACCORDING TO THE INTENT OF CONGRESS

The appeals court majority ruled that the transfer of the Hospital to a for-profit entity was not a diversion of Hill-Burton grant funds and consequently, the Govern-

ment's action was not within the purview of the statute of limitations codified at 28 U.S.C. § 2415(b). Judge Anderson dissented as to this holding, arguing that the panel majority's view of a "diversion of grant funds" was too limited.

The majority's analysis of this issue was nothing more than a word game. Apparently the majority found some support for its position through the questionable bifurcation of the transfer of the facility to a for-profit entity and the recoupment remedy that the Government has against the transferor and the transferee. Somehow, this bifurcation of act and remedy allowed the majority to distinguish the Government's action for recoupment from an action to recover diverted funds. Review of the Hill-Burton program's purpose will establish the error of the majority's analysis and resulting decision.

The purpose of the Hill-Burton Act was "to assist the several States in carrying out their programs for the construction and modernization of such *public* or *other nonprofit community hospitals* . . . to *furnish adequate hospital, clinic, or similar services to all their people.*" 42 U.S.C. § 291.[2] Clearly, the Hill-Burton program's purpose was not just the construction of hospitals. See *Euresti v. Stenner*, 458 F.2d 1115, 1117 (10th Cir. 1972). The Hill-Burton program provided for the construction of public and nonprofit hospitals for the purpose of insuring, on a long-range basis, that there would be hospital facilities available to all persons in the com-

2. The use of the past tense to describe the purpose of the Hill-Burton program is not to suggest that the program's purpose is not of an ongoing nature but only a recognition of the fact that the Hill-Burton program has not been funded by the Government for several years.

munity in which the facility was constructed. The appeals court majority contends that because the Hill-Burton funds sought to be recouped, were used to construct the facility there was no diversion of funds. If the Hill-Burton program was nothing but a public works program, this contention might be correct. As stated explicitly in the statute, however, the purpose of the Hill-Burton program went beyond the construction of hospitals; the purpose of the Hill-Burton program was to provide for the construction of public and nonprofit hospitals to serve the needs of all persons in the community. The transfer of a facility from a nonprofit or public entity to a for-profit entity would arguably defeat the purpose of the Hill-Burton program. Hence, the grant funds used to construct the hospital in question were diverted upon the transfer of the hospital to a for-profit entity because the facility constructed with the funds would no longer be serving the needs of all persons in the community. Consequently, the Government's action to recover for a diversion of such funds, under 42 U.S.C. § 291i, falls within the purview of 28 U.S.C. § 2415(b) as an action for recovery of grant funds that have been diverted.

The appeals court decision states that "the United States alleges a change in the ownership of a properly financed, full constructed hospital; the United States does not allege an improper diversion of the construction funds under the program." *City of Palm Beach Gardens, supra* at 340 (App. A, p. 7). Analysis of the Hill-Burton program establishes that the Government, through its allegation of a transfer in ownership of a Hill-Burton hospital from a nonprofit or public entity to a for-profit entity, does, in fact, allege an improper diversion of the Hill-Burton funds used to construct the hospital in question.

Obviously, Congress did not create an action for recoupment of Hill-Burton funds without some reason. The recoupment right was created to give the Government some mechanism whereby, if Hill-Burton funds were diverted from the Act's purpose of providing public and nonprofit hospitals for use by all persons, such funds could be recouped.

During the public testimony on the proposed Hill-Burton Act, the necessity for a recoupment mechanism to protect the Government's investment of funds was expressed on several occasions. "The public investment in facilities constructed by the means extended under this proposed legislation should be protected to secure the status of an approved project and the continued use of facilities in accordance with the purposes of the act and the standards under which it was approved." *Proposed Amendments to the Public Health Services Act: Hearings on S. 191 Before the Senate Committees on Education and Labor,* 79th CONG., Ist SESS. 1-6 (1945) p. 132 (hereinafter referred to as "*1945 Hearings*"). Clearly, the recoupment provision was intended to prevent a diversion of Hill-Burton grant funds from their intended purpose. "The public must be protected against the possibility that an applicant would secure funds for an approved purpose and would later use the facility in a manner not in keeping with the intent originally set forth in the application and in accordance with an approved State plan." *1945 Hearings,* p. 132. The Hill-Burton recoupment action was to serve as a safeguard:

> to ensure that such [Hill-Burton funded] hospitals will continue to carry out the purposes on which approval for their construction is based. It would seem wise to provide such safeguards in the bill to the end that its avowed purpose may be fulfilled.

> It should perhaps be provided that if a hospital is diverted to some restricted use not contemplated at the time of approval of the project, the Federal Government would have the right of recapture of the current value of its original investment.

1945 Hearings, p. 189-190.

Some of the conditions required for carrying out the Hill-Burton Act's purpose could be insured by the Government prior to the grant of Hill-Burton funds. Examples of such conditions are the assurances that were required of Hill-Burton grantees. 42 U.S.C. § 291c. Once the funds were distributed, however, and embodied in the facilities constructed, the Government had to have some mechanism of insuring that the grant funds would not be diverted from the purpose of the Act over a period of time. The mechanism provided by Congress, through an amendment to the original Hill-Burton Act proposal, was the recoupment provision provided in 42 U.S.C. § 291i.

The panel majority has ignored the policy and purpose behind the Hill-Burton Act in its determination that a recoupment action under 42 U.S.C. § 291i is not a "diversion of grant funds" within the purview of 28 U.S.C. § 2415(b). In that the appeals court majority ignored the Congressional policy and purpose behind the Hill-Burton Act in its analysis, the resulting decision is directly at odds to the rule of this Court that in evaluating an act of Congress, the Congressional policy behind the act must be recognized and applied. In short, effect must be given to the legislative will. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 44 L.Ed. 525, 95 S.Ct. 1893, 1898 (1975); *Sinclair Refining Company v. Atkinson*, 370 U.S. 195, 215; 82 S.Ct. 1328, 1339 (1962). Had the appeals court applied the Congressional policy and purpose behind the

Hill-Burton Act to its analysis, the recoupment provision under 42 U.S.C. § 291i would have been recognized as an attempt by Congress to insure that funds provided an entity under the Act were not subsequently diverted to purposes other than those intended under the Hill-Burton Act. Under a proper reading of the legislative intent of the Hill-Burton Act, an action for recoupment is clearly an action to recover diverted grant funds. Hence, the action for recoupment falls within the purview of the statute of limitations provided in 28 U.S.C. § 2415(b).

In dissent, Judge Anderson correctly criticized the limited view of the appeals court majority. Judge Anderson recognized the broad intent of the Hill-Burton Act in his conclusion that the transfer of a Hill-Burton facility to an unqualified entity was a diversion of grant funds and thus, the Hill-Burton recoupment action was controlled by the statute of limitations contained in 28 U.S.C. § 2415.

III.

THE APPEALS COURT ADOPTED A POSITION IN CONFLICT WITH THE LONGSTANDING RULE OF THIS COURT THAT THE LAWS EXISTING AT THE TIME A CONTRACT IS MADE ARE TO BE CONSIDERED CONTROLLING AND A PART OF THAT CONTRACT

The appeals court states that "the grant contract between the City and HEW neither obligates the City to maintain the hospital as a non-profit facility nor provides for federal recovery in the event of its transfer to a profit

making entity." *City of Palm Beach Gardens, supra,* at 340 (App. A, p. 8). A review of the contract entered into between the Government and the City plainly establishes otherwise (App. D). In Part 4 of the contract and in a revised Part 4 of the contract, there is contained a "Memorandum of Agreement." This Memorandum of Agreement provides, in pertinent part:

> Memorandum of Agreement made by and between:
>
> A. The Surgeon General, Public Health Service,
>
> B. The Florida Development Commission, Tallahassee, Florida (hereinafter called the State Agency), and
>
> C. City of Palm Beach Gardens (hereinafter called Applicant)
>
> *pursuant to Title VI of the Public Health Service Act,* as amended, (hereinafter called the Federal Act) and regulations thereunder prescribed by the Surgeon General.
>
> * * *
>
> IN CONSIDERATION OF THE FOREGOING, the parties hereto materially agree as follows:
>
> (1) *The Applicant* agrees . . . that the facility will *thereafter* be maintained and operated in accordance with the *assurances given in the application.*

(Emphasis added.)

The portions of the Memorandum of Agreement signed by representatives of the Government, the state agency and the City establish that, contrary to the statement of the appeals court majority, Title VI of the Public Health

Services Act, which includes the Hill-Burton recoupment provision, is included in the contract between the City and the Government. Accordingly, the Government's present action is founded on terms that are a part of an express contract; hence, the action falls within the purview of 28 U.S.C. § 2415(a).

The inclusion of the recoupment provision contained in 42 U.S.C. § 291i, as a term of the contract between the City and the Government, is supported by the longstanding rule that applicable laws existing at the time a contract is made or performed are considered terms of such contract.

> Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those *laws which affect its construction and those which affect its enforcement or discharge.*

(Emphasis added.) *Farmers' & Merchants' Bank, et al. v. Federal Reserve Bank,* 262 U.S. 649, 660, 43 S.Ct. 651, 655 (1923). See also *Home Building & Loan Ass'n. v. Blaisdell, et ux,* 290 U.S. 398, 429-430, 54 S.Ct. 231, 236, (1934); *Wood v. Lovett,* 313 U.S. 362, 370, 61 S.Ct. 983, 987 (1941).

Clearly, the appeals court ruling is contrary to several decisions of this Court. By refusing to recognize the applicability of Title VI, which includes 42 U.S.C. § 291i, to the agreement entered into between the City of Palm Beach Gardens and the Government, the appeals court has adopted a position completely at odds to the ruling

of this Court that laws existing at the time a contract is made are to be considered controlling and a part of that contract. The recoupment provision, as part of Title VI of the Public Health Service Act, is certainly embodied in the agreement between the City of Palm Beach Gardens and the Government. Consequently, the present recoupment action is brought pursuant to the terms of the grant contract entered into by the Government and the City of Palm Beach Gardens and is thus within the purview of the six year statute of limitations contained in 28 U.S.C. § 2415(a) as an action brought pursuant to the terms of an express contract or one implied in law or fact.

CONCLUSION

In summation, the Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this matter because the question under consideration is one of importance that should be decided by this Court. The question is important primarily because the recoupment language in question has been employed in many federal grant programs. Consequently, any decision in this matter will serve as precedent in recoupment actions under a variety of grant programs. The decision of the appeals court in resolving this important question is contrary to the intent of Congress as expressed in 28 U.S.C. § 2415 and in the Hill-Burton Act; the decision also fails to recognize this Court's longstanding

rule regarding the applicability of existing laws to contracts made under those laws.

Respectfully submitted,

BILL R. BLUDWORTH
Counsel for Petitioners

Of Counsel:

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(713) 658-1888

AFFIDAVIT OF SERVICE

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared BERNARD A. DUCO, JR., known to me, who being by me duly sworn, stated upon oath as follows:

"I, Bernard A. Duco, Jr., counsel for the City of Palm Beach Gardens, *et al.*, hereby certify that:

(1) All parties required to be served in this proceeding have been served, including the Solicitor General of the United States;

(2) Three (3) copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit were served on counsel for each of the other parties separately represented in this proceeding at their respective post office addresses, specifically:

Marleigh D. Dover
Civil Division
Department of Justice
Washington, DC 20530"

BERNARD A. DUCO, JR.

SUBSCRIBED AND SWORN TO before me on this the ____ day of August, 1981.

Notary Public in and for
The State of Texas

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

The CITY OF PALM BEACH GARDENS et al.,
Defendants-Appellees.

No. 79-1691.

United States Court of Appeals,
Fifth Circuit
Unit B

Jan. 26, 1981.

The United States brought action under Hill-Burton Act against city, which had received federal grant in 1964 to assist city in the construction of publicly-owned hospital and which had sold fully-constructed hospital in 1968 to a private, profit-making corporation. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., 466 F.Supp. 1155, entered summary judgment for city on grounds that suit was time-barred by six-year statute of limitations applicable to suits for recovery of money diverted from federal grant programs, and United States appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) action involved neither recovery under contract nor recovery of money diverted from grant program, so that statutes setting forth six-year limitations period had no application to the suit, and (2) because Hill-Burton Act contained no limitations period and no independent statute

of limitations applied, Congress intended to allow United States to seek recovery under the Act at any time.

Reversed and remanded.

R. Lanier Anderson, III, Circuit Judge, filed a dissenting opinion.

Leonard Schaitman, Marleigh Dover Lang, Michael Kimmel, Appellate Staff, Civil Div., Dept. of Justice, Washington, D.C., for plaintiff-appellant.

David R. Lowell, St. Petersburg, Fla., for Nelson.

Wood, Lucksinger & Epstein, Bill R. Bludworth, Houston, Tex., Robert E. Venney, Miami, Fla., for Palm Beach Gardens Community Hospital et al.

Brant & Baldwin, Lake Park, Fla., Bernard Duco, Jr., Houston, Tex., for City of Palm Beach Gardens.

Appeal from the United States District Court for the Southern District of Florida.

Before, VANCE, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

In this case the parties disagree as to the time within which the United States must bring suit under the Hill-Burton Act, 42 U.S.C. § 291i, for the recovery of federal funds used in the construction of a non-profit hospital sold to a profit-making organization. We reverse the decision of the trial court holding the United States time-barred from seeking such recovery following the transfer of a federally-supported hospital from public to private ownership.

Appellee, the City of Palm Beach Gardens, Florida, received a federal grant in 1964 under the Hill-Burton program to assist in the construction of a publicly-owned hospital. In 1968, the City sold its fully-constructed hospital to a private, profit-making corporation. The Hill-Burton Act provides that upon the transfer of any hospital constructed under this program to a profit-making organization, the federal government may sue either the transferor or the transferee for a share of the value of the hospital. 42 U.S.C. § 291i.[1] Appellant, the United States, brought this action in 1976 against the City for recovery of a share of the sale price of the Palm Beach Gardens hospital. The district court held that the United States was time-barred by the six year statute of limitations applicable to suits for recovery of money diverted from a federal grant program. 28 U.S.C. § 2415(b).[2]

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1. Title 42 section 291i provides in pertinent part:

If any facility with respect to whi h funds have been paid under section 291f of this title ["Payment for construction . . ."] shall, at any time within twenty years after the completion of construction—

(a) be sold or transferred to any person, agency, or organization (1) which is not qualified to file an application under section 291e of this title [i.e., " a State, political subdivision, or public agency or . . . a corporation or association which operates a nonprofit hospital . . ."]

. . . . .

the United States shall be entitled to recover from either the transferor or the transferee . . . an amount bearing the same ratio to the then value . . . of so much of the facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction or modernization under such project or projects.

2. Title 28, section 2415(b) provides, in pertinent part:

Subject to the provisions of section 2416 of this title ["Time for commencing actions brought by the United States—Exclusions"], and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be

The court entered summary judgment for the City of Palm Beach Gardens. The United States appeals.

[1] We must determine what limitations period applies to actions brought by the United States under the Hill-Burton Act, for the recovery of federal funds used in the construction of a non-profit hospital sold to a profit-making organization.

The City argues that the trial court properly looked to 28 U.S.C. § 2415(b) which governs any suit by the United States to recover money diverted from a grant program. The City contends that the court correctly viewed the 1968 hospital sale as a diversion of federal funds to a private, profit-making group. Under this view, the six-year limitations period prescribed by § 2415(b) would have expired prior to the institution of this action in 1976.

The City argues in the alternative that the six-year period set forth in 28 USC § 2415(a)[3] bars this action. This statute of limitations applies to any suit by the United States founded on an express or implied contract.

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barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That . . . an action to recover for diversion of money paid under a grant program . . . may be brought within six years after the right of action accrues . . .

3. Title 28, section 2415(a) provides, in pertinent part:
Subject to the provisions of section 2416 of this title ["Time for commencing actions brought by the United States—Exclusions"], and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or an agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . .

The City points to the express contract between itself and HEW concerning the grant money which the United States seeks to recover. The City also claims the existence of an implied contract under which the City received federal funds upon the condition that it maintain its hospital as a non-profit facility. The City views this suit as an action for breach of this implied contract and for prevention of unjust enrichment following its receipt of the sale price of the hospital.

The United States argues that neither § 2415(a) nor § 2415(b) apply because this suit stems from neither the diversion of federal funds nor the breach of any contract. The United States claims that this suit derives solely from the cause of action granted by the Hill-Burton Act. This Act contains no limitations period. The United States contends that Congress included no time limitation because it wanted to allow the tax-paying citizens of our country to recover grant funds through suit by the federal government at any time after the sale of a Hill-Burton hospital to a private organization. We agree.

[2, 3] It is well established that Congress may create a right of action without restricting the time within which the right must be exercised. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); *United States v. Sellers*, 487 F.2d 1268 (5th Cir. 1973). Moreover, courts have long held that the United States is not bound by any limitations period unless Congress explicitly directs otherwise. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); *United States v. 93 Court Corp.*, 350 F.2d 386 (2d Cir. 1965), *cert. denied*, 382 U.S. 984, 86 S.Ct. 560, 15 L.Ed.2d 473 (1966); *United*

States v. Borin, 209 F.2d 145 (5th Cir.), *cert. denied*, 348 U.S. 821, 75 S.Ct. 33, 99 L.Ed. 647 (1954). The doctrine that the mere passage of time cannot foreclose the rights of the United States derives from the common law principle that immunity from limitations periods is an essential prerogative of sovereignty. Blackstone, *Commentaries* 247 (1783). This doctrine remains viable today because it furthers the public policy objective of protecting rights vested in the government for the benefit of all from the inadvertence of the agents upon which the government must necessarily rely. As explained by the Supreme Court, the justification for this doctrine

> "is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." . . . [T]he rule is supportable now because its benefits and advantage extend to every citizen, including the defendant. . . .

Guaranty Trust Co. v. United States, 304 U.S. 126, 132, 58 S.Ct. 785, 788, 82 L.Ed. 1224 (1938) (quoting *United States v. Hoar*, 26 F.Cas. 329 (C.C.D. Mass.) (1821) (Story, J.)).

These principles apply to the case before us. The Hill-Burton Act grants the federal government a cause of action, but contains no limitations period. We must therefore conclude that Congress intended to allow the United States to bring an action under the Act at any time unless the City can demonstrate that Congress intended one of its independent, general statutes of limitations to apply to suits under the Act.

[4] The trial court accepted the argument of the City that 28 U.S.C. § 2415(b) should apply. This statute provides a six-year limitations period for actions by the United States "to recover for diversion of money paid under a grant program." 28 U.S.C. § 2415(b). Because we find that this case does not involve the diversion of construction funds provided under the Hill-Burton program, we reject application of § 2415(b). The City of Palm Beach Gardens properly used the money paid under the program for the construction of its hospital. Later, ownership of the hospital was transferred to a profit-making organization. The Hill-Burton program permits such transfers of ownership, though it also allows the federal government to seek reimbursement. Thus, the United States here alleges a change in the ownership of a properly-financed, fully-constructed hospital; the United States does not allege an improper diversion of the construction funds provided under the program. We, therefore, hold 28 U.S.C. § 2415(b) inapplicable.

[5] The City argues in the alternative that the six-year limitations period set forth in 28 U.S.C. § 2415(a) should apply in this case. That statute of limitations governs suits by the federal government which are "founded upon any contract express or implied in law or fact." We reject application of this statute because we do not view this action as resting upon any form of contract.

[6] Without question, the terms of the hospital grant to the City of Palm Beach Gardens are expressed in a contract between the City and HEW. The claim of the United States, though, is not contractual, but statutory. An action derives from contract only when a contract, "contains an undertaking 'to do the thing for the non-

performance of which the action is brought.'" *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*, 372 F.2d 18, 21 (3d Cir. 1966), *cert. denied*, 387 U.S. 930, 87 S.Ct. 2053, 18 L.Ed.2d 992 (1967) (quoting *Gulf Life Insurance Co. v. Hillsborough County*, 176 So. 72, 75, 129 Fla. 98, 104 (1937)). The grant contract between the City and HEW neither obligates the City to maintain the hospital as a non-profit facility, nor provides for federal recovery in the event of its transfer to a profit-making organization. It is the Hill-Burton Act which grants the federal government the right to seek reimbursement. We therefore conclude that this action is not founded upon an express contract so as to fall within the purview of 28 U.S.C. § 2415(a).

[7] Nor do we believe that the six-year limitations period of 28 U.S.C. § 2415(a) should apply because of a "contract . . . implied in law or fact" between the City and the federal government. Admittedly, such quasi-contractual obligations may arise even in conjunction with a statutory right of action. "A statutory right of recovery may be deemed quasi-contractual if it 'is a legal obligation, not based upon agreement, [and] enforced . . . by compelling the obligor to restore the value of that by which he was unjustly enriched.'" *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975) (quoting Corbin, *Quasi-Contractual Obligations*, 21 *Yale L.J.* 533, 550 (1912)). Quasi-contractual obligations arise, however, only when one party has been unjustly enriched at the expense of another. The United States alleges no unjust enrichment in this case. The City was under no obligation to maintain its hospital as a non-profit facility. Unlike the recipients of federal funds in the *Limbs* case, for instance, the City

was under no obligation to turn over money to the federal government upon the sale of its hospital to a profit-making organization. The Hill-Burton Act merely gives the United States the option of seeking recovery following such a sale. In the absence of unjust enrichment there can be no recovery based upon an implied contract. The six-year limitations period of 28 U.S.C. § 1245(a) is inapplicable.

Because this action involves neither recovery under a contract, nor recovery of money diverted from a grant program, we hold that the six-year limitations periods set forth in 28 U.S.C. §§ 2415(a) and (b) have no application to an action brought under the Hill-Burton Act, 42 U.S.C. § 291i. Since this Act contains no limitations period,[4] and no independent statute of limitations applies, we conclude that Congress intended to allow the United States to seek recovery under the Act at any time. We therefore reverse the decision of the trial court dismissing this action as time-barred. We remand for appropriate proceedings.

REVERSED AND REMANDED.

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4. Title 42 Section 291i does contain one clear limitation of a slightly different sort: if a Hill-Burton hospital is sold to a profit-making group more than twenty years after its construction, the United States does not even have a cause of action under this statute. See the language of 42 U.S.C. § 291i set forth in footnote 1.

R. LAINER ANDERSON, III, Circuit Judge, dissenting:

I believe that the general statute of limitations set out in 28 U.S.C. § 2415(b)[1] applies to bar the instant suit, and therefore I respectfully dissent. The majority apparently would acknowledge that the six-year statute of limitations contained in section 2415(b) would apply if the City of Palm Beach Gardens had diverted the actual construction funds granted under the Hill-Burton Act before the funds were expended in the construction project. However the majority holds that there is no diversion of construction funds here and declines to treat the undisputed diversion of the hospital itself—which was built in part with the grant funds—as the equivalent of a diversion of the funds. I respectfully disagree. I think the language of the statute of limitations—"diversion of money paid under a grant program"—should not be read so narrowly. I would interpret the language to mean diversion of the funds themselves, and diversion of the tangible assets which were bought with the funds.

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1. 28 USC § 2415(b) provides in pertinent part:
Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; *an action to recover for diversion of money paid under a grant program;* and an action for conversion of property of the United States may be brought within six years after the right of action accrues . . . . [Emphasis added]

APPENDIX B

UNITED STATES of America

v.

The CITY OF PALM BEACH GARDENS, a municipal corporation under the laws of the State of Florida, Palm Beach Gardens Community Hospital Corporation, Palm Beach Commmunity Hospital, Inc., American Medical International, Inc., Bernard L. Samson, Frank Bonsey, William B. Wood, William H. Horner, and Robert R. Nelson as Trustees and Distributees of United American Medical Services, Inc., a dissolved corporation.

No. WPB-76-8372-Civ-NCR.

UNITED STATES DISTRICT COURT

S. D. Florida,

West Palm Beach Division.

Jan. 17, 1979.

Government brought suit to recover a $400,000 grant awarded under the Hill-Burton Act for the construction of a nonprofit hospital built in city's name. The District Court, Roettger, J., held that: (1) Government's cause of action for recoupment of the grant accrued in favor of the Government no earlier than July 22, 1968, when city entered into a contract to sell the hospital to a group of individuals, and no later than March 17, 1970, when deed was recorded; and the cause of action was barred

as of March 17, 1976, since the Government, through its state Hill-Burton agency, could reasonably have known of the key events giving rise to the cause of action and the Act's tolling provisions were thus inapplicable, and (2) government's cause of action based on original breach of the grant's statutory condition was preserved against surviving corporation, a new one was not triggered by the corporate merger, and therefore, when the six-year period of limitations expired, so did the Government's original and only cause of action, where, relative to the merger, there was not an outright sale or transfer of assets but, instead, a merger agreement accompanied by an exchange of stock and by the survivor's express assumption of all liabilities and obligations of the transferor.

Judgment for defendant.

J. V. Eskenazi, U. S. Atty., Asst. U. S. Atty. Don R. Boswell, Miami, Fla., Leland Ware, Asst. Regional Atty., Dept. of Health, Education & Welfare, Atlanta, Ga., for plaintiff.

Brant & Baldwin, Lake Park, Fla., for City of Palm Beach Gardens.

Wood, Lucksinger & Epstein, Houston, Tex., Gunn, Venney & Buhler, Miami, Fla., for all defendants.

MEMORANDUM OPINION

ROETTGER, District Judge.

The Government has sued to recover a $400,000 grant awarded under the Hill-Burton Act for the construction of a non-profit hospital built in the name of the City of

Palm Beach Gardens. 42 U.S.C. § 291i. There is no dispute about the fact that the hospital was conveyed several years ago to a proprietary corporation and has been reconveyed several times since that time. The only question is whether the Government's claim for recoupment is barred by the 6-year statute of limitations. 28 U.S.C. § 2415(b).

FINDINGS OF FACT

The City of Palm Beach Gardens was incorporated and received its charter in 1959. The city was basically developed by the late John D. McArthur, who was not only the largest land owner in Palm Beach County but also one of the two or three richest men in the United States. Operating typically as a developer-controlled city, Palm Beach Gardens held no elections for City Councilmen until 1966 at which time the hospital had already been built and was standing idle in a cow pasture. The previous City Councils comprised employees of Bankers Life & Casualty Company (an asset of John McArthur) exclusively, and could be accurately described as developer-Councils. The hospital construction had been financed with a construction loan of approximately $800,000 from Bankers Life & Casualty Company and the Hill-Burton grant in issue. There were about 2,000 people living in Palm Beach Gardens in 1966.

The first Mayor testified that the city conducted feasibility studies about the city's operating the hospital and the reports were negative. In addition, the question of issuing bonds to operate the hospital was put to a straw vote before the citizenry who resoundingly turned it down. As a result the first elected City Council refused to issue the bonds although the predecessor developer-Council had

validated them. Finally, doctors refused to staff the facility.

The plight of this small city saddled by an apparently unnecessary hospital is dramatized by the fact that at this time it did not even have a city hall building. For a time the city clerk operated out of the back of a station wagon. Eventually, the city acquired a bottling works building and used it as a city hall. As the Mayor testified, although this situation may seem somewhat amusing now, the hospital was "serious business" to a small town of 2,000 people.

Consequently, the hospital sat idle in the middle of a cow pasture, and the city was burdened with an expensive and useless "white elephant." At the same time HEW was urging city officials to open the hospital, and was threatening to take some action about recoupment if they did not.

Apparently out of desperation and a desire to get the hospital running, the city began negotiating with a group of private individuals about a possible sale. The first city clerk testified that he met with Mr. Arthur W. Forehand, the head of the state Hill-Burton agency that monitors the Hill-Burton hospitals in the State of Florida, to check out the reliability of the potential purchasers. These eventual purchasers are defendants, Bernard L. Samson, William H. Horner, and Frank G. Bonsey (the Samson group). Later on, William B. Wood and Robert R. Nelson joined the group as purchasers. HEW depends on the state Burton-Hill agency to notify it of any conveyance to a proprietary corporation; it apparently never received any such official notification at the time of the first conveyance.

Negotiations began in 1968 for the transfer of the hospital from the city to the Samson group. The contract to sell was executed on July 22, 1968; modified for the first time on September 30, 1968, with a subsequent modification on April 14, 1969. Mr. Forehand testified that he never saw the agreement until July of 1974 although he had asked for it. He said he did not know it had been signed. However, Forehand had received a copy of a newspaper article which mentioned the sale, and on October 9, 1968 he wrote to the city advising it would be liable for recovery of the grant if it sold the hospital. No response was received from the city.

On November 18, 1968 Forehand again wrote the City Manager and asked if there was a new Mayor; again he advised city officials of the possible grant recovery. Once more there was no reply. Forehand testified he notified the Federal government of the proposed sale and that he had asked city officials for information about the sale. However, he also testified that during this time litigation in process between Palm Beach Gardens and John D. McArthur prevented any action until the litigation was cleared up. When the litigation was finally cleared up, some action in the form of an investigation was taken by the Florida Hill-Burton agency. He came to several meetings of the city during the period 1966 through March 1968 and Mr. Walter P. Hayes of the Atlanta Hill-Burton office was there at least at one other meeting. However, Forehand wrote nothing further between November 1968 and the time of the investigation that the Florida Hill-Burton agency conducted in 1974 because, he said, "I gave up on it." However, he apparently had learned the name of the new Mayor because he did write him during that period of time.

On October 4, 1968 a memo was typed at the Atlanta Regional Office of HEW regarding a telephone request of Mr. Samson for an appointment with Mr. Hayes of the HEW Hill-Burton office in Atlanta concerning the recovery provisions for the Federal share in the hospital. Later that month, Messrs. Samson and Horner visited with Mr. Hayes in Atlanta. They told him they wanted to buy the hospital and pay off the grant in payments extended over a period of time. Hayes advised them they would, instead, have to pay off the grant all at once because they were a proprietary corporation. Samson and Horner asked to read the applicable statute and told Hayes they did not think the grant created a lien on the property and that they did not have to pay it off until the Government filed suit. The Samson group then advised the city officials there was not any lien and apparently the attorneys for the city agreed. As part of the negotiations, the Samson group agreed to indemnify the city if the Federal government ever sued for recoupment and obtained a judgment.

The resulting acquisition made the newspapers in Palm Beach County with a headline that described it as the largest land deal of the year with the smallest down payment. This referred to the consideration paid for the hospital which was the assumption of an $800,000 mortgage, the $400,000 grant liability, and a small payment of cash. Also, the file of the Hill-Burton section of HEW contained a telephone transcription of a news article regarding possession of the hospital by United American Medical Services, Inc. and that "Samson was buying the hospital." The file also contained various newspaper articles about the status of the hospital. Hayes had written Forehand on October 25, 1968 after Samson and Horner visited him, which apparently acted as the stimulus for

Forehand's letter of November 18, 1968 to Mr. Bryan A. Poston, the City Manager of Palm Beach Gardens.

During 1968 the Samson group, who had apparently assigned their rights under the contract to United American Medical Services, Inc., went into the hospital as vendees in possession, spent hundreds of thousands of dollars on repairs, got it ready to open and filed for an original application to participate in the Medicare program on December 12, 1968. The hospital opened on November 15, 1968, with its first patient being admitted on November 18, 1968. The Medicare application was approved on January 30, 1969 and the agreement between the Secretary of HEW and the hospital was backdated to December 12, 1968. On page two of the request to establish eligibility there is an indication that the hospital operating under the name of Palm Beach Gardens Community Hospital, was a proprietary hospital with the ownership in the name of United American Medical Services, Inc. This application was received in the department of HEW which deals with health cost and finance administration, but it is totally separate from the HEW department administering the Hill-Burton program. In fact the hospital administrator didn't know Mr. Hayes or his successor. Annual Medicare cost reports were also filed with that department and each report classified the owner of the hospital as a proprietary corporation. The Medicare program, however, has no interest in whether the hospital is proprietary or non-profit.

On March 16, 1970, a deed was signed conveying the hospital from the City of Palm Beach Gardens to United American Medical Services, Inc. On October 2, 1970 a second deed was signed conveying the property from

United American Medical Services, Inc. to Palm Beach Gardens Community Hospital Corp. Finally, on December 11, 1970 another deed was executed conveying the hospital from Palm Beach Gardens Community Hospital Corp. to Palm Beach Gardens Community Hospital, Inc., both proprietary corporations. The first deed was recorded on March 17, 1970; the second on October 7, 1970; and the third on December 15, 1970.

On November 1, 1970, a plan for Reorganization and Merger Agreement was entered into by American Medical Enterprises, Inc., United American Medical Services, Inc. and Palm Beach Gardens Community Hospital Corporation. Under the terms of that complex agreement, American Medical Enterprises, Inc. was to create a wholly owned subsidiary named P.B.G.C.H., Inc. This was done on December 4, 1970. Then, P.B.G.C.H., Inc., was supposed to merge with Palm Beach Gardens Community Hospital Corporation, which was totally owned by United American Medical Services, Inc. Pursuant to an agreement executed on December 10, 1970, Palm Beach Gardens Community Hospital Corporation and P.B.G.C.H., Inc. did merge, leaving P.B.G.C.H., Inc., as the surviving corporation. P.B.G.C.H., Inc., then changed its name to Palm Beach Gardens Community Hospital, Inc., the present owner of the hospital. Also, as the surviving subsidiary contemplated by the November 1, 1970 agreement, P.B.G.C.H., Inc., became a party to that agreement. At present, it seems that American Medical Enterprises, Inc. has undergone a corporate change, and is survived by American Medical International, Inc. A.M.I. is the 100 percent owner of all stock in Palm Beach Gardens Community Hospital, Inc. On December 9, 1976 the Government filed suit for recoupment.

CONCLUSIONS OF LAW

This is an action authorized by 42 U.S.C. § 291i for the recovery of funds paid under provisions of that title to an institution which, within twenty years after completion of construction, is sold or transferred to a for-profit entity, and ceases to be a non-profit health care facility or hospital. The jurisdiction of this court is properly invoked under 28 U.S.C. § 1345.

The applicable statute of limitations in cases brought by the United States is 28 U.S.C. § 2415(b). It provides that "an action to recover for diversion of money paid under a grant program . . . may be brought within six years after the right of action accrues." Vital to the determination of this case are the provisions of 28 U.S.C. § 2416(c) which exclude from the computation of the limitations period, "all periods during which facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances."

By the provisions of 42 C.F.R. § 53.134, the Florida Department of Health and Rehabilitative Services was required to inform the Secretary of HEW in writing of any transfer to a non-qualified transferee of any facility receiving funds under the grant program. The questions essential to the resolution of this case are: (1) When did the government's cause of action accrue; (2) what facts could the government have reasonably known about; (3) when could the government be charged with that knowledge; and (4) does a corporate merger cause a "sale or transfer" within the meaning of 42 U.S.C. § 291i and thus trigger a cause of action in favor of the United States?

[1-3] It seems clear that the government's cause of action accrued at the time there was a breach of the conditions attached to the grant. This would occur whenever a transfer was made within twenty years after completion of construction to an institution which was not eligible under the Hill-Burton Act. For purposes of resolving the sole issue of when the cause of action accrued, the court feels that the time of discovery of the cause of action by the government is not material. It is the breach of a duty owed to plaintiff which gives rise to the cause of action, not discovery of the breach. *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59, 65, 73 S.Ct. 580, 583, 97 L.Ed. 821 (1953). *See also, Jankowitz v. United States,* 533 F.2d 538, 547, 209 Ct. Cl. 489 (1976). Thus the government had a right to sue for recoupment, at the earliest, when the first transfer was made to a for-profit institution.[1] At this time, the government first could have successfully maintained a suit based on that cause of action. *Bell v. Aerodex,* 473 F.2d 869, 873 (5th Cir. 1973).

From the court's findings of fact, it appears that the City entered into a contract to sell the hospital to a group of individuals on July 22, 1968. After several modifications of that agreement, it appears that on March 16, 1970 a warranty deed was signed and recorded the next day, which conveyed the hospital from the City of Palm Beach Gardens to United American Medical Services,

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1. Defendants claim that plaintiff's cause of action accrued during the two years when the hospital sat idle. The court disagrees. The statute allows for a cause of action when the hospital *ceases* (emphasis added) to be an eligible institution. If it never operated as an eligible institution, the court does not see how it could later cease to be one. *Compare, Poirrier v. St. James Parish Police Jury,* 372 F.Supp. 1021 (E.D. La. 1974).

Inc., clearly a for-profit corporation. There can be no doubt that at this point, the terms of the grant program had been breached, and a cause of action for recoupment had arisen in the government's favor.

However, the tolling provisions of 28 U.S.C. § 2416(c) do not allow the simple application of the six-year statute of limitations. By its terms, the statute requires the court to determine if there were key facts which the plaintiff neither knew nor could have reasonably known.

Looking at the circumstances existing in Palm Beach Gardens during the times in question, the court concludes the government had ample reason to suspect that the hospital might be sold to a for-profit entity in 1968. And that it had until 1974 to file this lawsuit. It appears that the government did not attempt to monitor the status of the hospital with personal inspection or any other definite method. The court does not conclude that the state Hill-Burton agency, acting as the agent for HEW, should be held to the rigorous standard of checking deeds at the county courthouse on a regular basis to see if federally funded institutions have changed hands; however, this case is replete with incidents, circumstances, and almost blatant "tips" which should have caused Florida Department of Health and Rehabilitative Services in Tallahassee to investigate and verify that the hospital had changed hands. Although this situation did not involve a Regional Circular which directed a state agent to make a personal visit, the court finds *United States v. City of Leesville*, 389 F.Supp. 943 (W.D. La. 1975) persuasive. "A quick trip to [Palm Beach Gardens] would bring the revelation." *Id* at 945. If the state Hill-Burton agency is to be charged with any responsibility at all, it must surely extend be-

yond allowing mail and telephone queries to go unanswered and ignored.

Considering the chronology of events testified to at trial, the court notes that HEW was urging the city to begin operating the hospital; that Arthur W. Forehand knew of the potential buyers; that he received newspaper clippings concerning the proposed sale; and that two of the prospective purchasers had even met with Mr. Hayes of HEW in Atlanta. It also appears from the record that during this time, the local media was giving prominent coverage to the possible transaction.

Besides these events, which the court finds should have made HRS reasonably aware of the change in status, the hospital started operating under the new group on November 15, 1968. Eventually, the hospital was even approved by HEW as a Medicare facility. This approval took place after the hospital had described itself as a for-profit institution on the application forms, and even subsequently reported itself as proprietary on cost reports.

In view of these events, it is easy to believe Mr. Forehand's admission that, "I gave up on it" when his queries to the city and hospital went unanswered. Otherwise, it does not seem possible that the hospital's change in status could go so totally undetected.

[4] Because it is unnecessary to do so as to defendant city or the Samson group, the court hesitates to single out one particular date or event which marks the accrual date of the cause of action. However, looking at the totality of the circumstances, the court holds that a cause of action for recoupment accrued in favor of the government against those defendants no earlier than July 22, 1968

and no later than March 17, 1970 when the deed was recorded. The court also holds that the government, through its state Hill-Burton agency, could reasonably have known of the key events giving rise to the cause of action, and that the tolling provisions of 28 U.S.C. § 2416(c) do not apply. Consequently, the government's cause of action arising out of the transfer culminated by the March 16 deed was barred by 28 U.S.C. § 2415(b) as of March 17, 1976. Because plaintiff did not file suit until December 9, 1976, its cause of action against these defendants must fail.

[5] The Secretary and his state agent could certainly be held to the standard of due diligence in monitoring these grant funds. The court agrees with the general proposition that "[f]ailure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Mungin v. Florida East Coast Railway Co.*, 318 F.Supp. 720 (M.D. Fla. 1970), *affirmed* 441 F.2d 728, *cert. denied*, 404 U.S. 897, 92 S.Ct. 203, 30 L.Ed.2d 175. The court also finds that the purchasing group's taking possession of the hospital facility and operating it after November 1968, was certainly sufficient to put a diligent person on notice that those purchasers had acquired rights in the hospital. *See National Indemnity Co. v. Banks*, 376 F.2d 533, 535 (5th Cir. 1967).

Plaintiff also claims that two subsequent transactions trigger new causes of action in its favor, and cite to *United States v. Brady*, 385 F.Supp. 1347 (S.D. Fla. 1974) as support. However, the government's reliance on that case is misplaced. In *Brady*, the court imposed liability on subsequent transferees, so that the purpose of the

statute could not be frustrated by the simple transfer in and out of a shell corporation. That case did not consider the type of corporate activity which exists here, and it is not dispositive of this case.

Here, the court is faced with the difficult task of determining whether the two subsequent transfers were "sales" or "transfers" within the meaning of 42 U.S.C. § 291i, and whether or not they create new causes of action in the government's favor. The resolution of this issue is crucial to the outcome of the case. If no new cause of action was triggered, then the government is barred and judgment must be entered in favor of the remaining defendants. If, however, these two transfers do trigger new causes of action, then it appears that the transferor and transferee involved in the December 11, 1970 transfer would be liable to the government.

To dispose of this question, the court must look closely at the language of 42 U.S.C. § 291i, and carefully examine the results of those two later transactions.

[6, 7] The language of the statute in question indicates that a cause of action shall accrue in the government's favor. "If any facility with respect to which funds have been paid . . . shall, at any time within twenty years after the completion of construction (a) be sold or transferred to any [non-qualified entity]." When a statute has clear and unambiguous language such as this, the Supreme Court has said that courts should give the statute its plain and ordinary meaning. *Braunstein v. Commissioner*, 374 U.S. 65, 83 S.Ct. 1663, 10 L.Ed.2d 757 (1963); *Labor Relations Board v. Highland Park Mfg. Co.*, 341 U.S. 322, 71 S.Ct. 758, 95 L.Ed. 969 (1951). It is thus improper for a court to rely on Congressional purpose

rather than a statute's plain language, or to decide "on a case by case basis, whether a given course of conduct is within the Congressional purpose." *Brennan v. Taft Broadcasting Company*, 500 F.2d 212, 217 (5th Cir. 1974) *citing Braunstein supra.* Another reason given by the Fifth Circuit in *Brennan* for rejecting a statute's asserted purpose when the law is written in plain language is that the "language should serve the function of indicating prohibited conduct. It is hardly reasonable to require persons affected by legislation to delve into voluminous and conflicting collections of speeches to determine whether what that statute plainly says is what it really means." *Id.* at 217.

[8] In light of this case, it would seem that the clear language of the statutory provision would actually draw support from the statute's obvious objective and would thus operate to trigger a cause of action if a sale or transfer is made any time within the applicable twenty year period. *See, Corum v. Beth Israel Medical Center*, 373 F.Supp. 550 at 556 n.4 (S.D. N.Y. 1974). This conclusion seems compelled by the statute's clear meaning and purpose, which is to keep the funded hospitals non-profit for at least twenty years. Thus a cause of action may be barred by the six-year period of § 2415, but that would not necessarily preclude the government from suing on the basis of a subsequent "sale" or "transfer", if it takes place within the 20-year period of 42 U.S.C. § 291; and it is an outright "sale" or "transfer".

The key question thus becomes: was the corporate activity resulting in the execution of the December 11, 1970 deed a sale or transfer within the meaning of 42 U.S.C. § 291i. The transaction evidenced by the October

2, 1970 deed will not be considered by the court because even if it were to find that a "transfer" or "sale" occurred, the government's cause of action would be barred for the same reasons as the March 17, 1970 transaction.

[9] It is a basic principle of corporation law that mergers and consolidations differ from the sale of a corporation or a transfer of its assets. *See generally*, 19 *Am. Jur.* 2d, *Corporations* § 1493. In a sale or transfer, the purchaser or transferee of the corporate assets is usually not liable for the debts and obligations of the seller or transferor corporation. *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F.Supp. 834 (S.D. N.Y. 1977). However in the case of a merger or consolidation, a succeeding or surviving corporation is liable for the debts of its predecessors. *Ladjevardian, supra* at 838-839; *Cortland Specialty Co. v. Commissioner of Internal Revenue*, 60 F.2d 937 (2d Cir. 1932). Thus in the latter situation, any interest of "stockholders and creditors of any [disappearing] company remain and are retained against the surviving or newly created company." *Id.* at 939. In Florida, it is made clear by statute that the effect of a merger will be to hold the survivor liable for all liabilities and obligations of each corporation merged. *Fla. Stat.* § 607.231 (3)(e).

[10] Once these distinctions in the effects of corporate changes are ascertained and considered in light of the language of 42 U.S.C. § 291i, it becomes apparent that a new cause of action is triggered only if there is an outright sale or transfer of corporate assets. In such a situation, this court's prior holding in *Brady* would apply and give rise to a new cause of action in favor of the government and against the subsequent transferors/transferees.

The government would then have a right to sue for recoupment after *any* sale or transfer within the twenty-year period, even if an earlier one had taken place more than six years prior. This holding is based on the statute's plain language, and is supported by Congress' purposeful inclusion of the twenty-year time bracket which limits the period of potential liability.

[11] In the situation before this court, however, there was not an outright sale or transfer. There was a merger agreement accompanied by an exchange of stock, and by the express assumption by the survivor of all liabilities and obligations of the transferor, Palm Beach Gardens Community Hospital Corp., which appear on the transferor balance sheet or are referred to in the notes thereof. In the Notes To Financial Statements dated August 31, 1970, it is expressly provided that the $400,000 grant, as the object of a possible chose in action in favor of the government, is to be recorded as a charge to property. It is clearly contemplated as a potential liability.

Thus any liabilities arising out of the transfer from the City to UAMS, Inc. or the transfer from UAMS, Inc. to Palm Beach Gardens Community Hospital Corp. were expressly assumed by the merger survivor, P.B.G.C.H., Inc. The Government's cause of action based on the orignial breach of the grant's statutory conditions was preserved against the surviving corporation; a new one was not triggered by the merger. Consequently, when the six-year period of 28 U.S.C. § 2415 expired, so did the government's original and only cause of action, which existed at the time the complaint was filed.

[12-14] An additional argument raised by the government at trial is that defendants should not be allowed to

take advantage of the statute and reap the benefits of a $400,000 windfall. If the limitations statute applies, the court must give heed to it and order the cause of action barred. Statutes of limitations are passed in order to assure the prompt disposition of legal claims, to punish neglect, and to prevent fraudulent or stale claims. The fact that a barred claim is a meritorious or just one, will not save it from the statute. A court cannot purposefully overlook it because the statute would operate to bar a meritorious claim. *See generally*, 51 *Am. Jur.* 2d, *Limitations of Actions*, §§ 17-19.

Accordingly, the court concludes that the first transaction evidenced by the March 16, 1970 deed was barred by 28 U.S.C. § 2415. For similar reasons the court also concludes that the transfer, evidenced by the October 2, 1970 deed, if indeed it was a transfer within the meaning of 42 U.S.C. 291i, is also barred. Finally, the court notes the long-standing distinctions between corporate sales, transfers, merges and consolidations, *see Cortland, supra* at 939, and concludes that the transaction signified by the December 11, 1970 deed was the culmination of a merger agreement, not a "sale" or "transfer", and that a new cause of action did not arise in the government's favor.

For the reasons set forth above, it is hereby

ORDERED AND ADJUDGED that the government's cause of action against these defendants is barred by 28 U.S.C. § 2415. It is

FURTHER ORDERED AND ADJUDGED that judgment be hereby entered in favor of defendants.

DONE AND ORDERED this 17 day of January, 1979.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 19

No. 79-1691

D. C. Docket No. 76-8372-Civ-NCR

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

THE CITY OF PALM BEACH GARDENS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

January 26, 1981

ANDERSON, Circuit Judge, dissenting.

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 79-1691

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

THE CITY OF PALM BEACH GARDENS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 1-26-81, 5 Cir., 198_, ____F.2d____).

Before VANCE, HATCHETT, and ANDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOSEPH W. HATCHETT
United States Circuit Judge

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PHS 62-4
Rev. 6-55

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE

Form Approved
Budget Bureau No 68-R309

PROJECT CONSTRUCTION
APPLICATION - PART 4

1. PROJECT NO. (Assigned by State Agency)
FLA - A - 107

2. LEGAL NAME OF APPLICANT
CITY OF PALM BEACH GARDENS

3. ADDRESS (City, County and State)
Lake Park, Palm Beach County, Florida

4. PLANS AND SPECIFICATIONS Four sets of final drawings and specifications upon which bids for construction were or are to be based, unless previously submitted, must be forwarded with this Part 4
(See instructions regarding identification)

5. DESCRIPTION OF FACILITY

A. NAME AND LOCATION OF FACILITY
Palm Beach Gardens General Hospital, City of Palm Beach Gardens, Florida

B. TYPE OF FACILITY *(Check each type of project proposed)*

- [x] GENERAL HOSPITAL
- [ ] PUBLIC HEALTH CENTER
- [ ] NURSING HOME
- [ ] TUBERCULOSIS HOSPITAL
- [ ] RELATED FACILITY
- [ ] DIAGNOSTIC OR DIAGNOSTIC AND TREATMENT CENTER
- [ ] MENTAL HOSPITAL
- [ ] CHRONIC DISEASE HOSPITAL
- [ ] REHABILITATION FACILITY

C. BED CAPACITY *(Patient beds only)*

	GENERAL	TUBERCULOSIS	MENTAL	CHRONIC	NURSING HOME
Existing beds					
Suitable					
Unsuitable					
Provided by construction					
New facility	58		2		
Addition					
Alteration					
Total suitable after construction	58		2		
Total unsuitable after construction					

D. DESCRIBE ANY MAJOR CHANGES IN PROJECT SINCE PART I

NONE

6. SUMMARY OF ESTIMATE OF CONSTRUCTION COSTS

The costs estimated and itemized below should be the total costs of the construction for which this application is submitted. If the application requests funds for the construction of two or more of the five types of projects (as listed in the General Instructions) for which Federal funds are allotted, the costs of each project must be itemized on the Continuation Sheet and attached to this application.

A. ESTIMATED COSTS IN WHICH THE FEDERAL GOVERNMENT MAY PARTICIPATE
(Attach detailed estimates for each of the following items)

(1) Construction contracts and contingency	$ 598,290.00
(2) Group I equipment not in construction contracts	87,500.00
(3) Group II and III Equipment	120,000.00
(4) Site survey and soil investigation	520.00
(5) Architect's fees	26,280.00
(6) Supervision and inspection at the site	8,000.00
(7) Acquisition of site *(Enter cost here if for Public Center site)*	
(8) Other *(Specify)*	
(9) SUB-TOTAL	$ 840,590.00
(10) Total cost in which the Federal government is requested to participate	$ 840,590.00

B. ESTIMATED COSTS IN WHICH FEDERAL GOVERNMENT MAY NOT PARTICIPATE

(1) Acquisition of site	$
(2) Other *(Specify)*	
(3) SUB-TOTAL	$

C. TOTAL ESTIMATED COST OF CONSTRUCTION *[Item A(9) plus B(3)]* TOTAL $

7. FINANCIAL ANALYSIS

A. Federal share of estimated costs	$ 336,236.00
B. State aid to be furnished *(If any)*	
C. Applicant's share of costs *[Item 6C minus (7A plus 7B)]*	504,354.00
D. Total estimated funds required TOTAL	$ 840,590.00

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The following is to be filled in by the STATE AGENCY o[illegible]

a. ANNUAL ALLOTMENT-The Federal share for t[illegible] project (Item 7A), is to be charged to the all[illegible]nt to the State for f[illegible] years as foll[illegible]

FISCAL YEAR	AMOUNT				
	PART C HOSPITALS AND PUBLIC HEALTH CENTERS	PART G			
		CHRONIC DISEASE HOSPITAL	DIAGNOSTIC OR DIAGNOSTIC AND TREATMENT CENTER	NURSING HOME	REHABILITATION FACILITY
1963.	336,236,00.				

9. In accordance with the approved State plan, the Federal share for this project is:

PART C 40% * PERCEN[illegible]

PART G PERCEN[illegible]

MEMORANDUM OF AGREEMENT made by and between

A. The Surgeon General, Public Health Service,

B. the Florida Development Commission
(State Agency Title)
(hereinafter called the State Agency), and

C. City of Palm Beach Gardens
(Legal Name of Applicant)
of Lake Park, Florida
(Address of Applicant)
(hereinafter called the Applicant),

pursuant to Title VI of the Public Health Service Act, as amended, (hereinafter called the Federal Act) and regulations thereunder prescribed by the Surgeon General.

THE STATE of Florida has submitted a State plan for construction of public and other non-profit hospitals and medical facilities the latest annual revision of which was approved by the Surgeon General under Part C of the Federal Act on 1/3/63 (Date) and under Part G of the Federal Act on 1/3/63 (Date).

THE APPLICANT has submitted an application for Federal aid in construction of a project under the State plan. This application, copies of which are held by the State Agency and the Surgeon General, meets all the requirements of the Federal Act and regulations thereunder and of the State Plan. The estimated costs of construction of the project, including equipment, in which the Federal Government will participate under the Federal Act and the approved Federal share are as follows:

HOSPITAL OR PUBLIC HEALTH CENTER
(PART C) $840,590,00 * at 40 * percent

CHRONIC DISEASE HOSPITAL
(PART G) $ _____ at _____ percent

NURSING HOME
(PART G) $ _____ at _____ percent

DIAGNOSTIC OR DIAGNOSTIC AND TREATMENT CENTER
(PART G) $ _____ at _____ percent

REHABILITATION FACILITY
(PART G) $ _____ at _____ percent

IN CONSIDERATION OF THE FOREGOING, the parties hereto mutually agree as follows:

(1) THE APPLICANT agrees that it will construct the project or cause it to be constructed to final completion in accordance with the application it has submitted and the plans and specifications attached thereto, and will comply strictly with the assurances contained in the application; that it will without delay obtain bids and enter into a contract for construction of the project; that the facility will thereafter be maintained and operated in accordance with the assurances given in the application; and that the funds for construction will be furnished as set forth above plus the full amount of any costs in which the Federal Government does not participate.

(2) THE STATE AGENCY hereby approves the application and recommends it to the Surgeon General for approval. The State Agency certifies that the application meets all the requirements of the State Plan, that the plans and specifications are in accordance with Appendix A to the regulations promulgated by the Surgeon General under the Federal Act; that the application contains reasonable assurances as to title, payment of prevailing rates of wages, and financial support for the non-Federal share of cost of construction and the entire cost of maintenance and operation when completed; that the application contains an assurance that in the operation of the facility there will be conformance to State standards for operation and maintenance and to all applicable State laws and State and local codes, regulations and ordinances. The State Agency agrees that it will periodically inspect the project and certify to the Surgeon General for payment such sums as are found to be payable under the Federal Act.

(3) THE SURGEON GENERAL hereby approves the application (subject, in the case of a rehabilitation facility, to the approval of THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE) and agrees to certify to the Secretary of the Treasury the Federal share of the cost of construction of the project as set forth above and further agrees to certify to the Secretary of the Treasury such sums as are certified to him by the State Agency from time to time as installments due under the Federal Act and regulations thereunder unless certification is withheld under Section 632(e) of the Federal Act; provided, however, the total amount so certified as installments due shall not exceed the approved Federal share of the actual necessary cost of the project as determined at its final completion.

IN WITNESS WHEREOF, THE PARTIES HAVE HEREUNTO AFFIXED THEIR SIGNATURES ON THE DATES INDICATED. (If this application is signed by two or more applicants, the singular shall be read as the plural when appropriate.)

DATE	LEGAL NAME OF APPLICANT		
2/11/64	CITY OF PALM BEACH GARDENS		
SIGNATURE OF RESPONSIBLE OFFICER	NAME OF RESPONSIBLE OFFICER (Type or Print)	TITLE OF OFFICER	
[signature]	Norman D. Rowland	Mayor	
DATE	NAME OF STATE AGENCY		
2/10/64	Florida Development Commission		
SIGNATURE OF RESPONSIBLE OFFICER	NAME OF RESPONSIBLE OFFICER (Type or print)	TITLE OF OFFICER	
[signature]	Autha W. Foreland	Manager Hospital Dept.	
DATE	FOR THE SURGEON GENERAL	TITLE OF OFFICER	
Feb. 11, 1964	[signature]	H.B.Cottrell, M.D., Regional Health Director	

FOR REHABILITATION FACILITIES ONLY

DATE	FOR THE SECRETARY	TITLE OF OFFICER

PHS-62-4- VI-2 REVISED

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

IV
Room 404 - 50 Seventh Street, N. E.
Atlanta, Georgia 30323

October 19, 1964

In reply refer to:
PHS/HMF/1

Fla-A-107

Hospital Construction Department
Florida Development Commission
Corner of Gaines & Adams Streets
Tallahassee, Florida 32304

Attn: Mr. Autha W. Forehand, Manager

Dear Mr. Forehand:

Approval is hereby given to the revised Part 4 of the Project Construction Application for the Palm Beach Gardens General Hospital, City of Palm Beach Gardens, Florida.

This permits the approval of Change Order No. 1 about which a separate letter is being written.

Sincerely yours,

H. B. Cottrell, M. D.
Regional Health Director

cc: Division of Hospital and Medical Facilities

CHawkins/co

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FILE COPY

OFFICE	SURNAME	DATE	OFFICE	SURNAME

Best Copy Available

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE

Form Approved
Budget Bureau No 68-R309

CONSTRUCTION
TION - PART II

REVISED

1. PROJECT NO. (Assigned by State Agency)
Fla-7-107

AL NAME OF APPLICANT
City of Palm Beach Gardens

3. ADDRESS (City, County and State)
Lake Park, Palm Beach County, Florida

. PLANS AND SPECIFICATIONS Four sets of final drawings and specifications upon which bids for construction were or are to be based, unless previously submitted, must be forwarded with this Part II
(See instructions regarding identification)

3. DESCRIPTION OF FACILITY

A. NAME AND LOCATION OF FACILITY

Palm Beach Gardens General Hospital, City of Palm Beach Gardens, Florida

B. TYPE OF FACILITY *(Check each type of project proposed)*

- [X] GENERAL HOSPITAL
- [ ] PUBLIC HEALTH CENTER
- [ ] NURSING HOME
- [ ] TUBERCULOSIS HOSPITAL
- [ ] RELATED FACILITY
- [ ] DIAGNOSTIC OR DIAGNOSTIC AND TREATMENT CENTER
- [ ] MENTAL HOSPITAL
- [ ] CHRONIC DISEASE HOSPITAL
- [ ] REHABILITATION FACILITY

C. BED CAPACITY *(Patient beds only)*

	GENERAL	TUBERCULOSIS	MENTAL	CHRONIC	NURSING HOME
Existing beds					
Suitable					
unsuitable					
Provided by construction					
New facility	58		2		
Addition					
Alteration					
Total suitable after construction	58		2		
Total unsuitable after construction					

D. DESCRIBE ANY MAJOR CHANGES IN PROJECT SINCE PART I

See change order number one

APPROVED FOR THE SURGEON GENERAL
H. B. Cottrell, Regional Health Director
Region IV (Date) OCT 19 1964

4. SUMMARY OF ESTIMATE OF CONSTRUCTION COSTS

The costs estimated and itemized below should be the total costs of the construction for which this application is submitted. If the application requests funds for the construction of two or more of the five types of projects (as listed in the General Instructions) for which Federal funds are allotted, the costs of each project must be itemized on the Continuation Sheet and attached to this application.

A. ESTIMATED COSTS IN WHICH THE FEDERAL GOVERNMENT MAY PARTICIPATE
(Attach detailed estimates for each of the following items)

(1) Construction contracts and contingency	$655,270.00
(2) Group I equipment not in construction contracts	87,500.00
(3) Group II and III Equipment	120,000.00
(4) Site survey and soil investigation	520.00
(5) Architect's fees	33,250.00
(6) Supervision and inspection at the site	
(7) Acquisition of site *(Enter cost here if for Public Center site)*	
(8) Other *(Specify)*	
Clerk of the Works	8,000.00
(9) SUB-TOTAL	$ 904,540.00
(10) Total cost in which the Federal government is requested to participate	$ 904,540.00

B. ESTIMATED COSTS IN WHICH FEDERAL GOVERNMENT MAY NOT PARTICIPATE

(1) Acquisition of site	$
(2) Other *(Specify)*	
(3) SUB-TOTAL	$

C. TOTAL ESTIMATED COST OF CONSTRUCTION *[Item A(9) plus B(3)]* TOTAL $

7. FINANCIAL ANALYSIS

A. Federal share of estimated costs	$ 361,816.00
B. State aid to be furnished *(If any)*	
C. Applicant's share of costs *[Item 6C minus (7A plus 7B)]*	542,724.00
D. Total estimated funds required TOTAL	$ 904,540.00

The following to be filled in by the STATE AGENCY only

8. ANNUAL ALLOTMENT-The Federal share for the project (Item 7A), is to be charged to the allotment to the State for fiscal years as follows:

FISCAL YEAR	AMOUNT				
	PART C HOSPITALS AND PUBLIC HEALTH CENTERS	PART G			
		CHRONIC DISEASE HOSPITAL	DIAGNOSTIC OR DIAGNOSTIC AND TREATMENT CENTER	NURSING HOME	REHABILITATION FACILITY
1963	300,000.00				
1964	61,415.00				

9. In accordance with the approved State plan, the Federal share for this project is:

PART C 40% PERCENT.

PART G PERCENT.

Best Copy Available

MEMORANDUM OF AGREEMENT made by and between

A. The Surgeon General, Public Health Service,

B. the Florida Development Commission
Tallahassee, Florida
(State Agency Title)
(hereinafter called the State Agency), and

C. City of Palm Beach Gardens
(Legal Name of Applicant)
of Lake Park, Florida
(Address of Applicant)
(hereinafter called the Applicant),

pursuant to Title VI of the Public Health Service Act, as amended, (hereinafter called the Federal Act) and regulations thereunder prescribed by the Surgeon General.

THE STATE of Florida has submitted a State Plan for construction of public and other non-profit hospitals and medical facilities the latest annual revision of which was approved by the Surgeon General under part C of the Federal Act on 4-15-64 (Date) and under part G of the Federal Act on 4-15-64 (Date).

THE APPLICANT has submitted an application for Federal aid in construction of a project under the State plan. This application, copies of which are held by the State Agency and the Surgeon General, meets all the requirements of the Federal Act and regulations thereunder and of the State plan. The estimated costs of construction of the project, including equipment, in which the Federal Government will participate under the Federal Act and the approved Federal share are as follows:

HOSPITAL OR PUBLIC HEALTH CENTER
(PART C) $ 904,540.00 at 40 percent

CHRONIC DISEASE HOSPITAL
(PART G) $ _____ at _____ percent

NURSING HOME
(PART G) $ _____ at _____ percent

DIAGNOSTIC OR DIAGNOSTIC AND TREATMENT CENTER
(PART G) $ _____ at _____ percent

REHABILITATION FACILITY
(PART G) $ _____ at _____ percent

IN CONSIDERATION OF THE FOREGOING, the parties hereto mutually agree as follows:

(1) THE APPLICANT agrees that it will construct the project or cause it to be constructed to final completion in accordance with the application it has submitted and the plans and specifications attached thereto, and will comply strictly with the assurances contained in the application; that it will without delay obtain bids and enter into a contract for construction of the project; that the facility will thereafter be maintained and operated in accordance with the assurances given in the application; and that the funds for construction will be furnished as set forth above plus the full amount of any costs in which the Federal Government does not participate.

(2) THE STATE AGENCY hereby approves the application and recommends it to the Surgeon General for approval. The State Agency certifies that the application meets all the requirements of the State plan, that the plans and specifications are in accordance with Appendix A to the regulations promulgated by the Surgeon General under the Federal Act; that the application contains reasonable assurances as to title, payment of prevailing rates of wages, and financial support for the non-Federal share of cost of construction and the entire cost of maintenance and operation when completed; that the application contains an assurance that in the operation of the facility there will be conformance to State standards for operation and maintenance and to all applicable State laws and State and local codes, regulations and ordinances. The State Agency agrees that it will periodically inspect the project and certify to the Surgeon General for payment such sums as are found to be payable under the Federal Act.

(3) THE SURGEON GENERAL hereby approves the application (subject, in the case of a rehabilitation facility, to the approval of THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE) and agrees to certify to the Secretary of the Treasury the Federal share of the cost of construction of the project as set forth above and further agrees to certify to the Secretary of the Treasury such sums as are certified to him by the State Agency from time to time as installments due under the Federal Act and regulations thereunder unless certification is withheld under Section 632(a) of the Federal Act; provided, however, the total amount so certified as installments due shall not exceed the approved Federal share of the actual necessary cost of the project as determined at its final completion.

IN WITNESS WHEREOF, THE PARTIES HAVE HEREUNTO AFFIXED THEIR SIGNATURES ON THE DATES INDICATED. (If this application is signed by two or more applicants, the singular shall be read as the plural when appropriate.)

DATE	LEGAL NAME OF APPLICANT		
September 6/9 1964	City of Palm Beach Gardens		
SIGNATURE OF RESPONSIBLE OFFICER	NAME OF RESPONSIBLE OFFICER (Type or Print)	TITLE OF OFFICER	
[signature]	Norman D. Roulond	Mayor	
DATE	NAME OF STATE AGENCY		
10/9 1964	Florida Development Commission		
SIGNATURE OF RESPONSIBLE OFFICER	NAME OF RESPONSIBLE OFFICER (Type or print)	TITLE OF OFFICER	
[signature]	Ruth W. Pemberton	Manager, Hospital Dept.	
DATE	FOR THE SURGEON GENERAL	TITLE OF OFFICER	
October 19, 1964	[signature] H. B. Cottrell, M.D.	Regional Health Director	

FOR REHABILITATION FACILITIES ONLY

DATE	FOR THE SECRETARY	TITLE OF OFFICER

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CV79-0-531

MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUTHERAN MEDICAL CENTER—RICHARD H. YOUNG MEMORIAL HOSPITAL,
Defendant.

Referred to the undersigned United States Magistrate for submission of findings and recommendations are plaintiff's motion for partial summary judgment (filing No. 8) and defendant's cross-motion for summary judgment (filing No. 9). Each side has attached to its motion a supporting affidavit and copies of various documents. Each side has submitted briefs exhaustively exploring the issues precipitated by their respective motions.

In this action the Government seeks recoupment of a $659,495 grant awarded to defendant in July of 1968, for construction of a community mental health center (hereinafter CMHC). That grant was authorized by the then existing provisions of the Community Mental Health Centers Act. 42 U.S.C. 2681, *et seq*. While the complaint

articulates into three causes of action three theories for recovery, that separation has no significance in the determination of the questions presented by the respective motions. Therefore, an elaboration on the technical niceties of the asserted causes of action would serve no useful purpose.

The Community Mental Health Centers Act was first enacted by the Congress in 1963. It was subsequently amended in 1975 and again in 1978. While, in their briefing, each side urges a differing conclusion as to whether the recovery here sought is more properly grounded in the provisions of the recovery section of the original act, 42 U.S.C. 2695, or in the amended section later codified as 42 U.S.C. 2689m, I find that the provisions of those two sections are substantially the same and reflect only a distinction without a difference which is without importance to resolution of the questions presented by the respective motions of the parties.[1] Accordingly, no deter-

---

1. The recovery provisions of the 1963 Act codified as *42 U.S.C. 2695* are:

> If any facility or center with respect to which funds have been paid under *section 2693* of this title shall, at any time within twenty years after the completion of construction—
>
> (1) be sold or transferred to any person, agency, or organization (A) which is not qualified to file an application under *section 2675* or *2685* of this title, or (B) which is not approved as a transferee by the State agency designated pursuant to *section 2674* of this title (in the case of a facility for the mentally retarded or persons with other development disabilities) or *section 2684* of this title (in case of a community mental health center), or its successor; or
>
> (2) cease to be a public or other nonprofit facility for the mentally retarded or persons with other developmental disabilities or community mental health center, as the case may be, unless the Secretary determines, in accordance with regulations, that there is good cause for re-

mination need be made as to which enactment provides the authorization for the filing of this action, since the

---

leasing the applicant or other owner from the obligation to continue such facility as a public or other nonprofit facility for the mentally retarded or persons with other developmental disabilities or such center as a community mental health center,

the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility or center which has ceased to be public or other nonprofit facility for the mentally retarded or persons with other developmental disabilities or community mental health center, from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the center is situated) of so much of such facility or center as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction of such project or projects. Such right of recovery shall not constitute a lien upon such facility or center prior to judgment.

The recovery provisions as subsequently amended in 1975 and 1978 and codified as *42 U.S.C. 2689m* are:

If any facility of a community mental health center acquired, remodeled, constructed, or expanded with funds provided under this subchapter is, at any time within twenty years after the completion of such remodeling, construction, or expansion or after the date of its acquisition with such funds—

(1) sold or transferred to any person or entity (A) which is not qualified to file an application under *section 2689j* of this title, or (B) which is not approved as a transferee by the State agency of the State in which such facility is located, or its successor; or

(2) not used by a community mental health center in the provision of comprehensive mental health services, and the Secretary has not determined that there is good cause for termination of such use.

the United States shall be entitled to recover from either the transferor or the transferee in the case of a sale or transfer or from the owner in the case of termination of use an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the United States district court for the district in which the center is situated) of so much of such facility or center as constituted an approved project or projects, as the amount of the Federal par-

ultimate result later recommended herein is the same regardless of which section is utilized as the basis for prosecution of this lawsuit.

The Community Mental Health Centers Act as enacted in 1963 authorized the Secretary of the Department of Health, Education and Welfare (now known as the Department of Health and Human Resources) to award monetary grants for the construction and equipping of mental health centers. Provision was made for allotment of funds to each state submitting a plan meeting requirements to be established by regulation. From these allotments, grants could be made upon application to the Secretary submitted through the state agency. By the provisions of 42 U.S.C. 2691(c) such a center was defined as follows:

> The term 'community mental health center' means a facility providing services for the prevention or diagnosis of mental illness, or care and treatment of mentally ill patients, or rehabilitation of such persons, which services are provided principally for persons residing in a particular community or communities in or near which the facility is situated.

The underlying purpose of the Act was set forth in *House Report* No. 694, 1963 *U.S. Cong. and Adm. News* 1054, 1058 in the following terms.

> It is planned that the community mental health centers will transfer the care of the mentally ill from state custodial institutions to community facilities

---

ticipation bore to the acquisition, remodeling, construction, or expansion cost of such project or projects. Such right of recovery shall not constitute a lien upon such facility or center prior to judgment.

and services provided at the community level for those who are physically ill.

Pursuant to authority granted in the Act, the Secretary promulgated regulations by which the furnishing of five essential services was required of a CMHC. In 42 C.F.R. 54.212 (1975) those services were listed as: (1) in-patient, (2) out-patient, (3) partial hospitalization, (4) 24-hour emergency service, and (5) consultation and education services to community agencies and professional personnel. The geographical area in which a CMHC is required to make delivery of those services is known as a "catchment area".

The Act also makes provision that, if within twenty years after completion of construction, a CMHC grantee ceases to be a CMHC (as phrased in 42 U.S.C. 2695 of the original Act) or the facility is not used as a CMHC (as phrased in 42 U.S.C. 2689m of the amended Act), and if the Secretary has not determined that there exists good cause for termination of the grantee's obligation, there is triggered a right of recovery by the United States in an amount to be computed from a formula specified in each of the above designated sections.

It is undisputed that in 1968 the defendant hospital applied for and received payment of a grant of $659,495 which was represented to be fifty percent of the cost of construction, renovation and equipping a CMHC facility as authorized by the CMHC Act, and that twenty years have not expired since the completion of construction of that facility. It is also undisputed that defendant has not met the five minimal services requirements to which it became obligated by reason of its acceptance of the grant, the

Secretary has determined that good cause does not exist to relieve the defendant of those obligations, and defendant has not repaid any part of the grant.

In this circumstance, the Government asserts that it is entitled to partial summary judgment declaring defendant's liability for repayment. Presumably, the Government's position is that trial is required only upon the issue as to the exact dollar amount of recovery to which it should be entitled by application of the formula set forth in the recovery statute upon which it relies.

The cross-motion of the defendant hospital seeks summary judgment that the Government's claim is barred by the six year statute of limitations provided for in 28 U.S.C. 2415. The Government's resistence to that assertion is two-fold; namely, (1) there exists no statute of limitations applicable to this action; and, (2) in any event, this action was instituted within six years after the Government's cause of action for recoupment became enforceable.

There can be no disagreement with the proposition advanced by the Government that the Community Mental Health Center Act in itself contains no limitations period and that unless one of the general statutes of limitations enacted by the Congress is found to be applicable, there is no prescribed period of time at which this action would be barred. The inquiry precipitated by defendant's motion is, then, first focused upon the question of whether 28 U.S.C. 2415 has application to the claim asserted in this complaint.

That section, first enacted in 1966, in pertinent part provides:

> (a) [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . . .
>
> (b) [E]xcept as otherwise provided by Congress, . . . an action to recover for diversion of money paid under a grant program . . . may be brought within six years after the right of action accrues. . . .

The nub of the Government's argument that 28 U.S.C. 2415 has no application is an assertion that, while the grant agreement between HEW and the defendant detailed responsbilities and obligations which defendant assumed by accepting the grant, the claims projected in this action cannot properly be characterized as based in contract; further, it is urged that since the funds were used by the defendant to construct a CMHC, there was in fact no diversion of funds; therefore, the obligation to operate the facility for twenty years in a manner fulfilling the five enumerated service requirements is a statutory obligation and the right to sue for recoupment when there is a breach of that obligation is likewise a statutory one unencumbered by any special or general limitations statute.

Realistically, it may be observed that most civil actions by the Government may be traced to some statutory authorization to bring suit in the event of certain occurrences. Decisional law clearly does not support the position here taken that the strictures of 28 U.S.C. 2415 do not apply to an action simply because the Government's right of recovery is statutorily authorized or that a con-

tractual relationship is not created where an obligation is one fixed by statute.

To the contrary, in *Euresti v. Stenner,* 458 F.2d 1115 (10 Cir. 1972), in an opinion by Justice Clark, it was held that an application for a Hill-Burton Act hospital grant, while incorporating statutory obligations, created a contractual relationship. In *United States v. Withrow,* 593 F.2d 802 (7 Cir. 1979), it was held that 28 U.S.C. 2415 was the applicable statute of limitations in a suit to recover Medicare overpayments. In *United States v. Limbs,* 524 F.2d 799, 801 (9 Cir. 1975) the Court said:

> The fact that the government's right to reimbursement derives from statute rather than common law does not affect characterization of the claim as quasi-contractual.

The Court there held that the provisions of 28 U.S.C. 2415 applied to a statutorily authorized action for restituiton of compensation benefits paid to injured employees after they received settlements from a third-party tortfeasor. And, in *United States v. Gera,* 409 F.2d 117 (3 Cir. 1969), it was held that the Government's right to reimbursement under the Medical Care Recovery Act is subject only to the time limitations fixed by 28 U.S.C. 2415.

Strikingly analogous to the issues presented by the present motions is the case of *United States v. City of Palm Beach Gardens,* 466 F.Supp. 1155 (S.D. Fla. 1979). There the Government brought suit for recoupment of a grant made under the Hill-Burton Act for construction of a non-profit hospital which the city subsequently transferred to a for-profit corporation. The action

was brought pursuant to the provisions of 42 U.S.C. 291i, a statute substantially similar to 42 U.S.C. 2695 upon which the instant action is based. Both statutes provide for recovery if either of two events occur within the twenty year period: (1) a sale or transfer to an unapproved entity; or (2) a cessation of operation for the purposes intended by the grant. The Court held the action to be one "to recover a diversion of money paid under a grant program" and that it was barred by the six year limitation period of 28 U.S.C. 2415(b).

The Government insists that the reasoning and result in *Palm Beach Gardens* are inapplicable because failure or cessation of the use of the facility built as a CMHC by this defendant cannot be characterized as a "diversion" of funds while an unauthorized sale or transfer of a facility does constitute a diversion. That distinction is patently untenable. Where a grant of funds is obtained to construct a facility for a particular purpose and the facility is then either not used for that purpose or there occurs a cessation of use for that purpose, there is surely no less a diversion than would be the case if sale or transfer of the facility were made. Any other construction would frustrate the purposes of the statute.

I find, therefore, that the six year limitation period of 28 U.S.C. 2415 does apply to this action, and whether the Government's causes of action be denominated as asserted in contract or quasi-contract or as recovery for diversion of money paid under a grant program is of little significance. The result is the same in either case.

The inquiry yet remaining is, when did the right of action accrue to the Government.

Both sides concede that there is a lack of documentation from which the date of completion of construction of the physical facility in question may be precisely ascertained. An inspection report made by an HEW mechanical engineer as the result of a site visit on January 27, 1972, indicates that the building was then substantially completed and occupied in most areas. The report made by an HEW medical officer of the results of a site visit on October 10, 1972, observed that HEW's regional office had never been notified of completion of the construction project and detailed then existing deficiencies in defendant's operations. The concluding paragraph of that report is:

> Every attempt should be made to offer consultation and technical assistance to the grantee. At the same time is should be made clear to him that non-compliance would have to lead to actions for recovery of the moneys provided under the construction grant.

The Director of Medical Services of the Department of Public Institutions of the State of Nebraska, who was also a member of the October 10 site visit team, on November 1, 1972, directed a letter to the then acting administrator for the defendant confirming defendant's failure to meet its obligation to have all required services in operation within ninety days after occupying the new facility. Required corrective measures were outlined including a fixed deadline of March 1, 1973, for submission of a mental health staffing grant application; and warning was made as follows:

> At this point in time, we hope Lutheran Medical Center will proceed immediately with meeting your

> obligations by taking the actions suggested above. All of these issues were discussed during our meeting with your staff October 10, 1972, with the exception of dates reflected in Point 5. Lutheran's failure to carry out the above suggestions in the time frame suggested would leave both State and Federal people no choice but to conclude that your center does not intend to provide services in keeping with your obligation. In that event, we would have no recourse but to begin proceedings toward recovery of construction grant funds.

By separate letters addressed to state and federal officials on January 18, 1973, defendant's administrator advised that completion of construction and equipment placement occurred on December 1, 1972, and that the opening date was January 1, 1973.

In response to a request that that information be supplied on an official form, on April 2, 1973, defendant's administrator executed form MH98 advising that opening date was January 1, 1973. That form included acknowledgement of defendant's obligation to make available within ninety days from that opening date, to all residents in its catchment area, the five services required of a CMHC.

HEW and Nebraska state officials conducted a two-day on-site visitation which commenced on July 31, 1973. The report of that visit fixed the date of the Center's initiation of operations as January 1, 1973, and the date upon which defendant was obligated to have in place the five required mental health services as April 1, 1973. Past unsatisfactory relationships between the federal and state agencies on one hand and the defendant on the

other hand were attributed to an unconcerned attitude displayed by the defendant's previous administrator. Greatly improved qualities of leadership and responsibility by the new administrator, who had assumed duties on December 1, 1972, were noted. Nonetheless, it was concluded that two of the required mental health services, partial hospitalization and emergency service, were not being provided and that the volume of the other three services, in-patient, outpatient and consultation, was so limited as to reflect a lack of an organized program of services needed by residents of the catchment area. The possible consequences of this circumstance were stated as follows:

> At the time of the site visit, we plainly indicated that the center was not in compliance and was in danger of action for recovery being taken by the government unless Lutheran Hospital could indicate a reasonable plan in a reasonable time.

That report also observed that defendant's financial condition could not permit it to eliminate the found deficiencies in its obligations without the assistance of a mental health staffing grant from HEW. In response to that invitation, an application for such a grant was made, and on September 1, 1973 HEW awarded a conditional grant of $409,776 to be used for the hiring of needed personnel.

The report of a final site visit on Ocetober 15-16, 1973, indicates that defendant presented a financial picture which precluded a successful operation as a CMHC HEW officials could not give assurance that the staffing grant would be continued in the future. In that circum-

stance, defendant's Board of Directors indicated a reluctance to accept the conditional grant already made and the visiting officials expressed an understanding of that position.

There followed on October 31, 1973, a letter from defendant's administrator advising: (1) of a decision by its Board of Directors not to accept the staffing grant; and, (2) the desire of the hospital to enter negotiations for recission of obligations incurred from the 1968 construction grant. Subsequent negotiations did not produce a compromise solution. On November 15, 1977, the Regional Health Administrator, acting on behalf of the Secretary, made a determination that good cause to release the defendant from the terms of the grant did not exist. The complaint in this case was filed on October 18, 1979.

Both parties agree that if the provision of 28 U.S.C. 2415 fixing a six-year limitation "after the right of action accrues" has application to this case, then the date upon which it can be found that the facility here involved ceased to exist as a CMHC is the date the Government's right of action accrued.

The Government argues that, in the undisputed factual circumstances related above, that date is October 31, 1973, which is the date of defendant's letter advice to HEW that it desired to negotiate a recission of its grant obligations, and which is less than six years prior to October 18, 1979 when this action was filed. The reasoning advanced is that a decision as to exactly when a grantee's provision of services is so inadequate that a facility ceases to exist as a CMHC is one that falls within the agency's area of expertise and that, in the light of the ongoing

efforts of HEW to assist defendant into a posture of compliance with its regulations, a cessation of operation of the facility as a CMHC was not clearly manifested until the October 31 letter; therefore, its decision that on October 31, 1973, the facility ceased to exist as a CMHC is a reasonable one entitled to great deference by the Court.

That argument assumes too much. The October 31 letter did not contain a notification that CMHC operations had ceased but rather simply advised of a decision not to accept the proffered staffing grant and to seek a negotiated release of the construction grant obligations. Further, that argument misinterprets the nature of the discretion available to any party invested with the right to bring suit. Once it became evident that defendant had defaulted in its grant obligations, the Secretary clearly possessed discretion to explore alternatives less drastic than suit for recoupment and to delay commencement of such a suit while reasonable efforts were pursued to bring defendant's facility into approved stature as a CMHC. However, that discretion could not have the effect of delaying the accrual of the cause of action. Its accrual must be determined totally apart from the Secretary's decision to withhold or to commence suit.

The general principle controlling resolution of an inquiry as to when a cause of action accrues for purposes of applying the bar of a statute of limitations period is stated thusly in 51 Am. Jur. 2d, *Limitation of Actions*, § 107 at page 679 (1970):

> The true test in determining when a cause of action arises or accrues is to establish the time when

> the plaintiff could have first maintained the action to a successful conclusion. . . . Thus a right of action accrues whenever such a breach of duty or contract has occurred . . . as will give a right to bring and sustain a suit.

Neither side has cited the Court to any decision making determination of when a cause of action by the Government for recoupment of a grant made under the Community Mental Health Centers Act has accrued. By independent research, the Court has found none.

Nevertheless, the reasoning advanced in *United States v. City of Palm Beach Gardens, supra,* is instructive. As noted earlier in these findings, that case involved a claim for recovery of a grant awarded under the Hill-Burton Act for construction of a non-profit hospital. The recovery statute there, 42 U.S.C. 291i, is identical to the recovery statute here involved in that recovery is authorized if, within twenty years after completion of construction, the facility is (1) sold or transferred to a for-profit entity, or (2) ceases to be a non-profit care facility or hospital. In that case a sale was made. The Court found that the Government's cause of action accrued no later than the date upon which the deed of transfer was recorded. That Court said at page 1160 of its opinion:

> It seems clear that the government's cause of action accrued at the time there was a breach of the conditions attached to the grant. This would occur whenever a transfer was made within twenty years after completion of construction to an institution which was not eligible under the Hill-Burton Act. For purposes of resolving the sole issue of when the cause of action accrued, the court feels that the

> time of discovery of the cause of action by the government is not material. It is the breach of a duty owed to plaintiff which gives rise to the cause of action, not discovery of the breach.

And, finally the Court also said at page 1164:

> An additional argument raised by the government at trial is that defendants should not be allowed to take advantage of the statute and reap the benefits of a $400,000 windfall. If the limitations statute applies, the court must give heed to it and order the cause of action barred. Statutes of limitations are passed in order to assure the prompt disposition of legal claims, to punish neglect, and to prevent fraudulent or stale claims. The fact that a barred claim is a meritorious or just one, will not save it from the statute. A court cannot purposefully overlook it because the statute would operate to bar a meritorious claim. *See* generally, 51 Am. Jur. 2d, *Limitations of Actions*, §§ 17-19.

In the factual situation presented by the instant case, defendant urges that the Government's cause of action accrued as early as November 1, 1972, which is the date that the Director of Medical Services of the Department of Public Institutions of the State of Nebraska sent his letter to defendant advising that the October 10, 1972, on-site visit revealed defendant's failure to provide CMHC services within ninety days after occupying the facility. While it is evident that by that date the Government possessed knowledge that CMHC services were not then being provided, the uncertainty in the evidence as to whether as early as August 1, 1972, the facility had in fact been opened as a CMHC creates some doubt for

the validitty of a finding that as of November 1, 1972, the Government could have prosecuted an action for recoupment to a successful conclusion.

Clearly, however, by subsequent events that doubt is dissipated as of a date possibly as early as April 1, 1973, and certainly no later than August 1, 1973. Either date is more than six years prior to the filing date of the complaint. On January 18, 1973, defendant's administrator gave definite advice to all interested officials that the facility had opened as a CMHC on January 1, 1973. It is unquestioned that at that moment defendant was obligated to have in place within ninety days thereafter (April 1, 1973) all of the five mandated services. It is also unquestioned that those services were not by April 1, 1973, nor at any time thereafter, provided by defendant. That fact was clearly confirmed by the on-site visit concluded on August 1, 1973. Inexorably, then, it follows that, upon defendant's failure to provide CMHC services within the obligated ninety-day period, it's facility ceased to be a CMHC and there was triggered the Government's right to prosecute to a successful conclusion an action for recoupment of the construction grant. Meritorious as may have been its decision to delay institution of litigation while other avenues for resolution of the problems created by this failed operation were pursued, that circumstance can have no relevance to the time at which its right to litigate came into being.

I find, therefore, that no facts material to resolution of the legal issues here presented are in dispute, that the causes of action stated in the instant complaint accrued more than six years prior to the October 18, 1979 filing

date of the complaint, and that those causes are each barred by the provisions of 28 U.S.C. 2415.

IT IS THEREFORE RECOMMENDED to District Judge Albert G. Schatz that an order be entered denying plaintiff's motion (filing 8) for partial summary judgment, granting defendant's motion (filing 9) for summary judgment, and dismissing plaintiff's complaint.

DATED this 26th day of February, 1981.

/s/ GIRAURD C. PECK
United States Magistrate

Opposition

Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS
CLERK

No. 81-311

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF PALM BEACH GARDENS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

MICHAEL KIMMEL
MARLEIGH D. DOVER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the six-year statute of limitations established by 28 U.S.C. 2415 applies to a suit under 42 U.S.C. 291i, which permits the government to recover the value of a federal grant supporting construction of a non-profit hospital that has been converted to a profit-making enterprise within 20 years after the completion of construction.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-311

CITY OF PALM BEACH GARDENS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 635 F. 2d 337. The opinion of the district court (Pet. App. B-1 to B-18) is reported at 466 F. Supp. 1155.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (Pet. App. C-1 to C-2), and a petition for rehearing was denied on May 21, 1981 (Pet. App. C-3 to C-4). The petition for a writ of certiorari was filed on August 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 42 U.S.C. 291i provides in pertinent part:

> If any facility with respect to which funds have been paid under section 291f of this title shall, at any time within twenty years after the completion of construction—
>
> (a) be sold or transferred to any person, agency, or organization (1) which is not qualified to file an application under section 291e of this title, or (2) which is not approved as a transferee by the State agency designated pursuant to section 291d of this title, or its successor, or
>
> (b) cease to be a public health center or a public or other nonprofit hospital * * *
>
> the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility which has ceased to be public or nonprofit, from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of the facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction or modernization under such project or projects. Such right of recovery shall not constitute a lien upon said facility prior to judgment.

2. 28 U.S.C. 2415(a) and (b) provide in pertinent part:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact,

shall be barred unless the complaint is filed within six years after the right of action accrues * * *.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, * * * an action to recover for diversion of money paid under a grant program * * * may be brought within six years after the right of action accrues * * *.

STATEMENT

1. In 1964, the City of Palm Beach Gardens, Florida ("the City") received a grant of $400,000 from the United States Department of Health, Education, and Welfare ("HEW") to assist in the construction of a publicly-owned non-profit hospital under Title VI of the Public Health Service ("Hill-Burton") Act, 42 U.S.C. 291 *et seq.* The Hill-Burton Act does not prohibit the sale or transfer of such a hospital to a private for-profit entity. However, in the event that the grantee does so within 20 years after the completion of the federally assisted construction, the United States is entitled to recover the current value of the original grant from either the transferor or the transferee. 42 U.S.C. 291i. The question in this case is whether the government's suit for recovery of this sum was barred by the six-year statute of limitations set forth in 28 U.S.C. 2415.

Although the Palm Beach Gardens Hospital was completed in 1966, the City did not open the facility (R. 417).[1]

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[1] "R." refers to the record in the court of appeals. "Tr." refers to the district court trial transcript.

Instead, it agreed on August 28, 1968 to sell the hospital to a group of individuals who opended it on November 15, 1968, and operated it for 16 months as vendees in possession (Pet. App. B-7). Prior to opening the hospital, the individuals formed a proprietary organization, United American Medical Services, Inc. (UAMS), to which they assigned their rights to purchase the hospital (R. 424). UAMS received title to the hospital on March 16, 1970 (Pet. App. B-7). On October 2, 1970, UAMS transferred title to the facility to Palm Beach Gardens Community Hospital Corp., another proprietary organization (R. 251). On December 11, 1970, Palm Beach Gardens Community Hospital Corp. merged with Palm Beach Gardens Community Hospital, Inc., a subsidiary of American Medical Enterprises, which subsequently was renamed American Medical International (AMI) (Pet. App. B-8). All of these entities were proprietary corporations (R. 721, 722). As part of the merger, title to the hospital was transferred to the AMI subsidiary that was the surviving corporation (R. 718). Palm Beach Gardens Community Hospital thus was never operated as a non-profit facility.

Although the Florida Hill-Burton agency (see 42 U.S.C. 291d(a)(1)) had heard reports of a proposed sale of the hospital prior to March 1970 and relayed these reports to HEW, neither the state agency nor HEW, which relies on the state agency to inform it of any transfer of a facility to a non-qualified entity, had actual notice of these transactions until 1974 (Tr. 28).

2. On December 9, 1976, the United States filed suit in the United States District Court for the Southern District of Florida against the petitioners, City of Palm Beach Gardens, UAMS, Palm Beach Gardens Community Hospital Corp., Palm Beach Gardens Community Hospital, Inc., and AMI, under 42 U.S.C. 291i in order to recover the value of the grant funds (Pet. App. B-8). On January 17, 1979, the

district court entered judgment for the petitioners, holding that the government's action was barred by the six-year statute of limitations contained in 28 U.S.C. 2415(b).[2]

A divided court of appeals reversed, holding that the government's cause of action was not time barred as to any of the petitioners. The court held that Section 2415(b) was not applicable here because the government's claim did not rest upon a tort or any "diversion of money paid under a grant program" within the meaning of that section (Pet. App. A-7). The court held that 28 U.S.C. 2415(a) was likewise inapplicable, because the government's action was not based on an express or implied contract (Pet. App. A-7). The court recognized that a contractual relationship existed between the City and HEW, but noted that the contract itself neither obligated the City to maintain the hospital as a non-profit facility, nor provided for the government's recovery in the event of a transfer to a profit-making entity (*id.* at A-8). Moreover, the court rejected

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[2]The district court held that the applicable statute of limitations is 28 U.S.C. 2415(b) (Pet. App. B-9) and that the tolling provisions of 28 U.S.C. 2416(c) are inapplicable (Pet. App. B-10 to B-13). The court found that the government's time for bringing suit with respect to the March 16, 1970 transfer from the City to UAMS expired on March 16, 1976 (*id.* at B-13) and that the claim resting on the October 2, 1970 transfer from UAMS to Palm Beach Gardens Community Hospital Corp. was also time-barred (*id.* at B-18). Finally, the court concluded that the December 11, 1970 merger was not a "sale or transfer" within the meaning of 42 U.S.C. 291i, because it did not entail an "outright sale or transfer of corporate assets" and accordingly held that this last transaction did not give rise to a cause of action (Pet. App. B-14 to B-17).

On appeal, the government argued that the six-year limitations period of 28 U.S.C. 2415 does not apply. It also argued that even if the six-year statute of limitations applied, its action was timely, relying upon the tolling provision of 28 U.S.C. 2416, and arguing that the December 11, 1970 transaction was covered by the recoupment provision. In light of its resolution of the threshold question, the court of appeals did not reach these additional contentions.

petitioners' characterization of the government's claim as one founded upon a contract implied in law. Although the court acknowledged that such quasi-contractual obligations may arise in conjunction with a statutory right of action, it observed that the government's suit does not involve a claim of unjust enrichment—an essential element of a quasi-contractual cause of action (*ibid.*). Nor could the statute support such a characterization, in the court's view, because the Hill-Burton Act does not oblige grantees to maintain federally-assisted hospitals as non-profit facilities; rather, it "merely gives the United States the option of seeking recovery following such a sale" (*id.* at A-9).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court.[3] Further review of this interlocutory ruling is not warranted.

1. In enacting the Hill-Burton Act, Congress sought to promote the construction of public and other non-profit hospitals by providing federal funding for such purposes. S. Rep. No. 1274, 88th Cong., 2d Sess. (1964). Although Congress did not prohibit grantees or their transferees from converting such hospitals to profit-making entities, it sought to encourage the operators of such hospitals to

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[3]Petitioners have noted (Pet. 9 n.1; Pet. App. E) the Magistrate's Findings and Recommendations in *United States* v. *Lutheran Medical Center—Richard H. Young Memorial Hospital*, No. CV 79-0-531 (D. Neb., filed Oct. 19, 1979), concerning former provisions of the Community Mental Health Centers Act somewhat analogous to 42 U.S.C. 291i, which rely upon the district court's opinion in this case. On September 14, 1981, subsequent to filing of the petition, the district court in *Lutheran Medical Center*, relying upon the decision of the court of appeals in this case, rendered an opinion rejecting the magistrate's recommendation and holding that the government's action was not time barred.

continue non-profit operations by enacting a recovery provision, 42 U.S.C. 291i, providing:

> If any facility with respect to which funds have been paid under section 291f of this title shall, at any time within twenty years after the completion of construction * * * be sold or transferred to any person, agency, or organization * * * which is not qualified * * * the United States shall be entitled to recover from either the transferor or the transferee * * * an amount bearing the same ratio to the then value * * * as the amount of the Federal participation bore to the cost of construction * * *.

As the court of appeals correctly held, however, Congress did not provide a time within which the government must exercise that entitlement.

It is well established that Congress may create a right of action without restricting the time within which it must be exercised. *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977); *United States* v. *Sellers*, 487 F. 2d 1268, 1270 n.1 (5th Cir. 1974); *Anderson* v. *United States Atomic Energy Commission*, 313 F. 2d 313 (7th Cir. 1963); *Thompson* v. *United States*, 312 F. 2d 516 (10th Cir. 1962), cert. denied, 373 U.S. 912 (1963). Indeed, this Court has long held that the United States is not bound by any statute of limitations unless Congress explicitly directs otherwise. See, *e.g.*, *United States* v. *Beebe*, 127 U.S. 338, 344 (1888); *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152, 155 (1912); *Phillips* v. *Commissioner*, 283 U.S. 589, 602-603 (1931). As the court of appeals observed (Pet. App. A-6), the origin of this strict rule is traceable to the common law principle that immunity of the government from statutes of limitations is an essential prerogative of sovereignty. See W. Blackstone, *Commentaries* 247 (1783). The rule is based on the policy, which retains undiminished force, that the rights and property that are

vested in the government are for the benefit of all and, absent statutory direction, should not depend on the actions of individual government agents. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938); see also *United States* v. *Weintraub*, 613 F.2d 612, 614 (6th Cir. 1979). Accordingly, because 42 U.S.C. 291i does not prescribe any limitations period, a claim arising thereunder does not expire with the passage of time unless one of the general statutes of limitations enacted by Congress is applicable thereto.

2. a. Petitioners rely principally (Pet. 12-17) upon 28 U.S.C. 2415(b) to supply a limitations period. 28 U.S.C. 2415(b) establishes the limitations period for tort actions. It prescribes a three-year limitations period for tort actions generally, but allows six years for commencement of actions "to recover for *diversion of money* paid under a grant program" (emphasis added). The court of appeals correctly held that Section 2415(b) has no application to the government's claim, because this is not a case where money was diverted or where the City fraudulently induced the government to give it money for one purpose and then put the funds to some other use. The City properly used the funds paid under the grant program to construct the hospital. There was therefore no tort or "diversion of money" in this case. Rather, it was the ownership of the facility that was subsequently transferred.[4] The court of appeals' analysis (Pet. App. A-7) is sound:

> The Hill-Burton program permits such transfers of ownership, though it also allows the federal government to seek reimbursement. Thus, the United States

[4]The legislative history of the Hill-Burton Act cited by petitioners (Pet. 15-16) does not support their contentions. The purpose of the recoupment provision—to provide an incentive for continued nonprofit operation of the grantee facility—does not support the characterization of the recoupment action as one to recover diverted *funds* within the meaning of 28 U.S.C. 2415(b).

here alleges a change in the ownership of a properly-financed, fully-constructed hospital; the United States does not allege an improper diversion of the construction funds provided under the program. We, therefore, hold 28 U.S.C. § 2415(b) inapplicable.

b. The City argues alternatively (Pet. 17-20) that the limitations period set forth in 28 U.S.C. 2415(a) is applicable in this case. 28 U.S.C. 2415(a) provides a six-year statute of limitations for any action brought by the government "founded upon any contract express or implied in law or fact." The court of appeals correctly declined to "view this action as resting upon any form of contract" (Pet. App. A-7). For statute of limitations purposes, an action is founded on an express contract or one implied in fact only if the instrument contains an "undertaking 'to do the thing for the nonperformance of which the action is brought.' " *Mack Trucks, Inc.* v. *Bendix-Westinghouse Automotive Air Brake Co.*, 372 F. 2d 18, 21 (3d Cir. 1966). Here, however, the grant agreement neither obligates the City to maintain the hospital as a non-profit facility for a period of 20 years, nor provides for the government's recovery of its proportionate share if it is not so maintained. Indeed, the contractual "assurances" contained in the City's grant application (see Pet. 18) do *not* include an assurance that the hospital will be maintained as a non-profit entity.[5] Rather, it is the statute, 42 U.S.C. 291i, that creates the government's right of recovery asserted in this case.[6]

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[5]The assurances contained in the City's grant application are reproduced in an Appendix to this brief (App., *infra*, 1a-3a).

[6]The cases cited by petitioners (Pet. 19) are not to the contrary. Rather, these cases merely delineate the authority of the states to enact reasonable legislation regarding the formulation, interpretation, and enforcement of contracts. They do not address the interpretation of 28 U.S.C. 2415(a) or any related issue. See *Farmers Bank* v. *Federal*

3. Petitioners nevertheless argue that 28 U.S.C. 2415 should be construed to bar the government's action because Congress sought to promote the public interest "by encouraging, through a statute of limitations, the timely prosecution of claims by the Government" (Pet. 12). However, the legislative history of Section 2415 reveals that Congress recognized the "general rule * * * that there is no limitation of time against the Government for bringing an action unless it is specifically authorized by statute" and enacted 28 U.S.C. 2415 to establish limitations against "*certain* government actions," as an exception to the general rule whose vitality was unimpeached. S. Rep. No. 1328, 89th Cong., 2d Sess. 11 (1966) (emphasis added). Because none of the provisions of Section 2415 is applicable to the government's recoupment claim under 42 U.S.C. 291i, the generalized sentiments culled from the legislative history by petitioners (Pet. 9-12) have no relevance here.

Petitioners' characterization of the government's agents as negligent and "bumbling" (Pet. 12) is not properly addressed to this Court. As stated above, it is for Congress to limit the rights of the United States. Here, the government has paid $400,000 for the construction of a public

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Reserve Bank, 262 U.S. 649, 660 (1923); *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934); *Wood* v. *Lovett*, 313 U.S. 362, 370 (1941).

Petitioners have not otherwise pressed the contention, rejected by the court of appeals (Pet. App. A-8 to A-9), that the government's claim may be classified for statute of limitations purposes, as one based on a contract implied in law. In any event, the decision of the court of appeals, on which we rely, is clearly correct. The statutory claim is available against both transferors and transferees of hospitals converted to for-profit use, and the measure of recovery is fixed by statute without regard to factual considerations as to unjust enrichment. See 42 U.S.C. 291i. Petitioners' argument sweeps far too broadly, encompassing all statutory causes of action within the rubric of contract claims. Congress, however, is fully capable of specifying statutory claims when it intends to address them. Compare 28 U.S.C. 1491.

hospital that was never operated as such. Rather than limit the government's right of action, Congress has determined that the United States is entitled to recover the value of its grant in the circumstances of this case. Moreover, there is no unfairness in allowing this particular case to proceed because, as the petition clearly reveals (Pet. 4-5), petitioners have always been aware of the government's right of recovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

DOJ-1981-10

APPENDIX

Page 3 of the City's grant application, dated February 18, 1963 contains the following:

> THE APPLICANT HEREBY GIVES ASSURANCE TO THE STATE AGENCY:
>
> A.
> That actual construction work will be performed by the lump sum (fixed price) contract method, that adequate methods of obtaining competitive bidding will be or have been employed prior to awarding the construction contract, either by public advertising or circularizing three or more bidders, and that the award of the contract will be or has been made to the responsible bidder submitting the lowest acceptable bid;
>
> B.
> That section 2, Labor Standards (Form PHS-144 as revised) will be included in all construction contracts in excess of $2,000; that construction contracts in excess of $2,000 will prescribe the minimum rates of pay for laborers and mechanics engaged in the construction of the project as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, 49 Stat. 1011, as amended, and the regulations issued pursuant thereto by the Secretary of Labor;
>
> C.
> That all construction contracts regardless of amount will include paragraph 8, section 2, Labor Standards (form PHS-144 as revised) relating to kickbacks;
>
> D.
> That the project will not be advertised or placed on the market for bidding until the final working drawings and specifications have been approved by the Surgeon General and the applicant has been so notified;

E.
That no construction contract or contracts for the project or a part thereof, the cost of which is in excess of the estimated cost approved in the application for that portion of the work covered by the plans, will be entered into without the prior approval of the Surgeon General;

F.
That the construction contract will require the contractor to furnish performance and payment bonds, the amount of which shall each be in an amount not less than fifty percentum (50%) of the contract price, and to maintain during the life of the contract adequate fire, workmen's compensation, public liability and property damage insurance;

G.
That any change or changes in the contract which (a) makes any major alteration in the work required by the plans and specifications, or (b) raises the total contract price over the approved estimate of cost of the work covered by the plans and specifications will be submitted to the Surgeon General for prior approval;

H.
That the construction contract will provide that the Surgeon General, the State Agency and their representatives will have access at all times to the work wherever it is in preparation or progress and that the contractor will provide proper facilities for such access and inspection;

I.
That the applicant will provide and maintain competent and adequate architectural or engineering supervision and inspection at the project to insure that the completed work conforms with the approved plans and specifications;

J.
That, when the project is completed, it will be operated and maintained in accordance with minimum standards prescribed by the State Agency for the maintenance and operation of such facilities;

K.
That the facility will provide a reasonable volume of free patient care. (See instructions.)